Supreme Court, U.S.
FILED
MAR 6 1991
OFFICE OF THE CLERK

No. 90-615

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RAFAEL PERETZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR PETITIONER

JOEL B. RUDIN
MASS & RUDIN
598 Madison Avenue, 15th Floor
New York, New York 10022
(212) 753-8700

RICHARD W. LEVITT
148 East 78th Street
New York, New York 10021
(212) 737-0400

JOEL BRENNER *
76 Tompkins Street
East Northport, New York 11731
(516) 757-9189
Counsel for Petitioner

* Counsel of Record

QUESTIONS PRESENTED

1. Does 28 U.S.C. Section 636 permit a magistrate to conduct the *voir dire* in a felony trial if the defendant consents?

2. If 28 U.S.C. Section 636 permits a magistrate to conduct a felony trial *voir dire* provided that the defendant consents, is the statute consistent with Article III?

3. If the magistrate's supervision of the *voir dire* in petitioner's trial was error, did the conduct of petitioner and his attorney constitute a waiver of the right to raise this error on appeal?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT	2
SUMMARY OF THE ARGUMENT	5
ARGUMENT	10
I. THE FEDERAL MAGISTRATES ACT DOES NOT AUTHORIZE A MAGISTRATE TO PRESIDE AT JURY SELECTION FOR A FELONY TRIAL REGARDLESS OF WHETHER THE DEFENDANT 'CONSENTS'	10
II. A CRIMINAL DEFENDANT MAY NOT CONSENT TO A MAGISTRATE'S EXERCISE OF ARTICLE III 'JUDICIAL POWER' AT A FELONY TRIAL	15
A. Magistrates Purport to Act as Article III-'Adjuncts' When Conducting Felony *Voir Dire*	16
B. Because a Magistrate's Conduct of Felony *Voir Dire* is Immune From Meaningful Independent Review by the District Court, the Magistrate's Role is Unconstitutional Under the 'Adjunct' Model	18
C. Even if the *Schor* Balancing Test Were Applied, Congress' Minimal Interest in the Delegation to Magistrates of Felony *Voir Dire* is Far Outweighed by the Harm to Article III Concerns	30

TABLE OF CONTENTS—Continued

	Page
D. A Defendant's 'Consent' Cannot Validate a Magistrate's Exercise of Judicial Power That Exceeds Article III Limits	37
III. PETITIONER DID NOT FORFEIT HIS RIGHT TO APPEAL BECAUSE HIS ATTORNEY'S 'CONSENT' DID NOT COMPLY EITHER WITH STATUTORY OR CONSTITUTIONAL REQUISITES FOR WAIVER OF SUCH A BASIC CONSTITUTIONAL RIGHT	38
A. Since Magistrates Lack Any Consent Jurisdiction Over Felony *Voir Dire*, Petitioner's Right to Object on Appeal Was Immune From Forfeiture or Waiver	38
B. Even if a Defendant in a Felony Prosecution Can Consent to Magistrate-Supervised *Voir Dire*, Such Consent Must be Knowing, Intelligent and Voluntary	40
C. Petitioner's Counsel's Agreement to Magistrate-Supervised *Voir Dire* Did Not Meet Constitutional Requirements	47
D. Harmless Error Analysis is Inapplicable to *Gomez*-Type Error	49
CONCLUSION	50
STATUTORY APPENDIX	1a

TABLE OF AUTHORITIES

Cases	Page
Adams v. United States ex rel. McCann, 317 U.S. 269 (1942)	44
Aetna Insurance Co. v. Kennedy, 301 U.S. 389 (1937)	43
Ambrose v. Welch, 729 F.2d 1084 (6th Cir. 1984)	40
American Fire & Casualty Co. v. Finn, 341 U.S. 6 (1951)	37, 39
Aptheker v. United States, 378 U.S. 500 (1964)	28
Archie v. Christian, 768 F.2d 726 (5th Cir. 1985)	40
Argersinger v. Hamlin, 407 U.S. 25 (1972)	42
Bank of Nova Scotia v. United States, 108 S. Ct. 2369 (1988)	13
Barker v. Wingo, 407 U.S. 514 (1972)	43, 45, 46
Batson v. Kentucky, 476 U.S. 79 (1986)	25, 27
Boykin v. Alabama, 395 U.S. 238 (1969)	43, 44-45
Brewer v. Williams, 430 U.S. 387 (1977)	43
Brookhart v. Janis, 384 U.S. 1 (1966)	43, 45
Brown v. Louisiana, 447 U.S. 323 (1980)	24
Buckley v. Valeo, 424 U.S. 1 (1976)	29
California v. LaRue, 409 U.S. 109 (1972)	39
Capital Traction Co. v. Hof, 174 U.S. 1 (1899)	44
Caprera v. Jacobs, 790 F.2d 442 (5th Cir. 1986)	40
Carnley v. Cochran, 369 U.S. 506 (1962)	42
Chandler v. Judicial Council, 398 U.S. 74 (1970)	34
Chapman v. California, 386 U.S. 18 (1967)	49
Clark v. Poulton, 914 F.2d 1426 (10th Cir. 1990)	40
Colorado Building and Construction Trades Council v. B.B. Anderson Construction Co., Inc., 879 F.2d 809 (10th Cir. 1989)	40
Commodity Futures Trading Commission v. Schor, 478 U.S. 833 (1986)	*passim*
Crowell v. Benson, 285 U.S. 22 (1932)	20, 21, 28
Davis v. United States, 411 U.S. 233 (1973)	46
Faretta v. California, 422 U.S. 806 (1975)	33
Fowler v. Jones, 899 F.2d 1088 (11th Cir. 1990)	40
Fuentes v. Shevin, 407 U.S. 67 (1972)	28

TABLE OF AUTHORITIES—Continued

	Page
Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037 (7th Cir. 1984)	29
Gilberti v. United States, 917 F.2d 92 (2d Cir. 1990)	3, 48
Glidden Company v. Zdanok, 370 U.S. 530 (1962)	29, 40, 47, 50
Gomez v. United States, 109 S. Ct. 2237 (1989)	*passim*
Government of the Virgin Islands v. Williams, 892 F.2d 305 (3d Cir.), *cert. denied*, 110 S. Ct. 2211 (1990)	4, 11
Granfinanciera, S.A. v. Nordberg, 109 S. Ct. 2782 (1989)	16, 17, 20, 30
Gray v. Mississippi, 481 U.S. 648 (1987)	24, 49
Hall v. Sharpe, 812 F.2d 644 (11th Cir. 1987)	40
Henry v. Mississippi, 379 U.S. 442 (1965)	45
In re United States (Sayeedi), 903 F.2d 88 (2d Cir. 1990)	5
Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982)	37, 39, 40
Irvin v. Dowd, 366 U.S. 717 (1961)	25
Johnson v. New Jersey, 384 U.S. 719 (1966)	23
Johnson v. Zerbst, 304 U.S. 458 (1938)	*passim*
Lego v. Twomey, 404 U.S. 477 (1972)	22
Mathews v. Weber, 423 U.S. 261 (1976)	7, 19, 21, 27
McClaughry v. Deming, 186 U.S. 49 (1902)	39
Miranda v. Arizona, 384 U.S. 436 (1966)	46
Morrison v. Olson, 108 S. Ct. 2597 (1988)	29
Muskrat v. United States, 219 U.S. 346 (1911)	18
Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982)	*passim*
O'Callahan v. Parker, 395 U.S. 258 (1969)	17
O'Donoghue v. United States, 289 U.S. 516 (1932)	34
Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292 (1937)	43
Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc., 725 F.2d 537 (9th Cir.), *cert. denied*, 469 U.S. 824 (1984)	18, 29, 34

TABLE OF AUTHORITIES—Continued

	Page
Palmore v. United States, 411 U.S. 389 (1973)	17
Patton v. United States, 281 U.S. 276 (1930)	44
Patton v. Yount, 467 U.S. 1025 (1984)	25
Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984)	25
Public Citizen v. United States Department of Justice, 109 S. Ct. 2258 (1989)	12
Reid v. Covert, 354 U.S. 1 (1957)	17
Reynolds v. United States, 98 U.S. 145 (1879)	23
Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)	32-33
Rideau v. Louisiana, 373 U.S. 723 (1963)	24
Ristaino v. Ross, 424 U.S. 589 (1976)	24
Rosales-Lopez v. United States, 451 U.S. 182 (1982)	23, 24-25
St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936)	20
Schneckloth v. Bustamonte, 412 U.S. 218 (1973)	46
Smith v. Phillips, 455 U.S. 209 (1982)	25
Teague v. Lane, 489 U.S. 288 (1989)	40
Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568 (1985)	30
United States v. Aikins, 912 F.2d 285 (9th Cir. 1990), *modified*, 923 F.2d 650 (1991)	4, 42, 49
United States v. Alvarado, 923 F.2d 253 (2d Cir. 1991) (on remand)	5, 27
United States v. Atkinson, 297 U.S. 157 (1936)	47
United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955)	17
United States v. France, 886 F.2d 223 (9th Cir. 1989), *aff'd by an equally divided court* (Jan. 22, 1991)	4, 11, 23, 44
United States v. Gagnon, 470 U.S. 522 (1985)	46
United States v. Garcia, 848 F.2d 1324 (2d Cir. 1988), *rev'd sub nom. Gomez v. United States*, 109 S. Ct. 2237 (1989)	2, 26, 27, 48
United States v. Gipson, 835 F.2d 1323 (10th Cir.), *cert. denied*, 466 U.S. 1044 (1988)	33

TABLE OF AUTHORITIES—Continued

	Page
United States v. Hernandez, 862 F.2d 17 (2d Cir. 1988)	26
United States v. Hvass, 355 U.S. 570 (1958)	13
United States v. Lake, 910 F.2d 414 (7th Cir.), *cert. denied*, 110 S. Ct. 3283 (1990)	4
United States v. Leon, 468 U.S. 897 (1984)	23
United States v. Mang Sun Wong, 884 F.2d 1537 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1140 (1990)	3-4, 5
United States v. Marcyes, 557 F.2d 1361 (9th Cir. 1977)	40
United States v. Martinez-Torres, 912 F.2d 1552 (1st Cir. 1990)	4, 42
United States v. Miller, 468 F.2d 1041 (4th Cir. 1972), *cert. denied*, 410 U.S. 935 (1973)	40
United States v. Musacchia, 900 F.2d 493 (2d Cir. 1990)	4, 5, 11
United States v. Peretz, 904 F.2d 34 (2d Cir. 1990)	1
United States v. Raddatz, 447 U.S. 667 (1980)	*passim*
United States v. VanWort, 887 F.2d 375 (2d Cir. 1989), *cert. denied sub nom. Chapoteau v. United States*, 110 S. Ct. 1927 (1990)	5
United States v. Wey, 895 F.2d 429 (7th Cir. 1990)	4
United States v. Young, 470 U.S. 1 (1985)	46
Wainwright v. Witt, 469 U.S. 412 (1985)	23
Wheat v. United States, 108 S. Ct. 1692 (1988)	33, 43
Wingo v. Wedding, 418 U.S. 461 (1974)	14
Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787 (1987)	37

Constitutional Provisions

Article I	17, 18, 30
Article II, § 2, cl. 2	12, 29
Article III	*passim*
Article IV	17
Amend. IV	45
Amend. V	35, 45
Amend. VI	45

TABLE OF AUTHORITIES—Continued

Statutes

	Page
5 U.S.C. §§ 701-706	37
18 U.S.C. § 3142	33
18 U.S.C. § 3401	9, 38, 41, 42
18 U.S.C. § 3553	33
28 U.S.C. § 132	13
28 U.S.C. § 455	33
28 U.S.C. 461 (1940 ed.)	14
28 U.S.C. § 631	18
28 U.S.C. § 634	18
28 U.S.C. § 636	*passim*
28 U.S.C. § 994	33
28 U.S.C. § 1254	1
Fed. R. Crim. P. 1	13
Fed. R. Crim. P. 3	13
Fed. R. Crim. P. 4	13
Fed. R. Crim. P. 5	13
Fed. R. Crim. P. 5.1	13
Fed. R. Crim. P. 7	44
Fed. R. Crim. P. 9	13
Fed. R. Crim. P. 11	33, 44
Fed. R. Crim. P. 12	5, 46
Fed. R. Crim. P. 14	26
Fed. R. Crim. P. 23	13, 44
Fed. R. Crim. P. 24	13
Fed. R. Crim. P. 25	13, 14
Fed. R. Crim. P. 32	13
Fed. R. Crim. P. 40	13
Fed. R. Crim. P. 41	13
Fed. R. Crim. P. 43	46
Fed. R. Crim. P. 44	33
Fed. R. Crim. P. 48	33
Fed. R. Crim. P. 54	13
Fed. R. Evid. 105	26
Fed. R. Evid. 403	26
Fed. R. Evid. 404	26
Fed. R. Evid. 608	26
Fed. R. Evid. 609	26
Fed. R. Evid. 1101	13
Fed. Local Ct. R. 1 (E.D.N.Y.) (1988)	29

TABLE OF AUTHORITIES—Continued

Page

Other

114 Cong. Rec. 27,342 (1968) 42
1972 Advisory Committee Notes, 18 U.S.C.A. Rule 54 (West 1976) 14
H.R. 3, 89th Cong., 1st Sess., *reprinted in Bankruptcy Court Act of 1983: Hearings on H.R. 3 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983) 31
H.R. Rep. No. 287, 96th Cong., 1st Sess. (1979) 18, 42
H.R. Rep. No. 1609, 94th Cong., 2d Sess. (1976) 14, 28
Federal Magistrates Act: Hearings Before the Subcomm. on Improvements in Judicial Machinery Of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess. (1966) 35
Federalist No. 83 (A. Hamilton) (New American Library ed. 1961) 22
Kaufman, *Chilling Judicial Independence*, 88 Yale L.J. 681 (1979) 34
Saphire, *Shoring Up Article III: Legislative Court Doctrine in the Post-CFTC v. Schor Era*, 68 B.U.L. Rev. 85 (1988) 30
Note, *The Boundaries of Article III: Delegation of Final Decision Making Authorities to Magistrates*, 52 U. Chi. L. Rev. 1032 (1985) 16
Note, *The Validity of United States Magistrates' Criminal Jurisdiction*, 60 Va. L. Rev. 697 (1974) 35
Note, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View*, 88 Yale L.J. 1023 (1979) 34, 35
United States Sentencing Commission, *Guidelines Manual*, Ch. 6, Part B (Nov. 1990) 33

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-615

RAFAEL PERETZ,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

OPINION BELOW

The decision of the court of appeals is reported at 904 F.2d 34 (2d Cir. 1990) (Table), but the court's opinion is unpublished. The opinion is reproduced at Pet. A. 1a-4a.[1] The district court issued no written opinion in this case.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1990. A petition for rehearing was denied on July 11, 1990 (Pet. A. 5a-6a). Certiorari was granted on January 22, 1991, limited to three questions. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

[1] J.A. refers to the Joint Appendix filed in this Court. Pet. A. refers to the appendix annexed to the petition for certiorari. Brf. A. refers to the appendix, containing constitutional and statutory materials, annexed to this brief.

STATEMENT

Petitioner Rafael Peretz and a co-defendant were charged in a three-count indictment filed July 25, 1988, in the United States District Court, Eastern District of New York (J.A. 1). Specifically, Peretz and the co-defendant were charged with importing approximately four kilograms of heroin, which were seized in the possession of the co-defendant on July 12, 1988, during an incoming Customs search at John F. Kennedy International Airport in New York City.

In an informal status conference held October 14, 1988, before the Hon. Charles P. Sifton, district judge, at which no government attorney was present, the court asked Peretz's counsel whether there was "[a]ny objection to picking the jury before a magistrate?" Counsel replied, "I would love the opportunity" (J.A. 2). Immediately before commencing jury selection on January 6, 1989,[2] the magistrate, Carol B. Amon, asked Peretz's counsel for consent, and counsel complied (J.A. 5). Magistrate Amon then proceeded to conduct the *voir dire*, a process that produced 90 pages of transcript. At one point, the magistrate granted a government cause challenge and excused a juror over defense counsel's vigorous objection. Tr. 26.

There is no evidence in the record that anyone explained to Peretz the difference between an Art. III district judge and a magistrate, or that he had a right to have an Art. III judge preside at jury selection at all. In fact, prior to petitioner's trial, the second circuit held that a defendant had no statutory or constitutional right to the presence of the district judge at felony *voir dire*, *see United States v. Garcia*, 848 F.2d 1324 (2d Cir. 1988), *rev'd sub nom. Gomez v. United States*, 109 S. Ct. 2237 (1989), and it was the "practice . . . in this circuit" to override a defendant's objection to assignment of this function to a magistrate, *Gilberti v. United States*, 917 F.2d 92, 95 (2d Cir. 1990). No one explained to Peretz (or to his counsel) that Peretz had a right to obtain review by the district judge of the magistrate's handling of jury selection, nor did any local rule set forth a procedure for such review. Peretz did not personally consent to substitution of a magistrate at *voir dire*.

[2] The transcript is dated December 2, 1988, but the docket sheet reflects that the *voir dire* occurred January 6, 1989. Only the pre-*voir dire* colloquy was transcribed for the proceedings below and is part of the record on appeal; the balance of the jury selection transcript was prepared after certiorari was granted. The complete transcript has been lodged with the Clerk's Office of this Court.

On January 11, 1989, the jury was sworn before the district court judge. The court did not offer or in fact conduct any review of the jury selection process (J.A. 6-9). Nine days later, Peretz was convicted on all three counts; his co-defendant was acquitted. Prior to sentencing, Peretz moved to set aside the verdict in light of this Court's decision in *Gomez v. United States*, that magistrates lack authority to conduct jury selection for a felony trial. The court denied the motion. Sentencing Tr. 4 (Sept. 28, 1989). It then sentenced petitioner to concurrent sentences on each count of 135 months in prison and five years of supervised release, and a total special assessment of $150.

On appeal, Peretz argued that reversal was required because (1) the district court had failed to obtain his knowing, voluntary, written personal waiver of his fundamental right to have an Art. III judge preside at jury selection; (2) the error was jurisdictional and could be raised on appeal despite the absence of a contemporaneous objection; and (3) such objection would have been futile.[3] Brf. for Appellant 10-19.

In an unpublished, summary affirmance of petitioner's conviction, the court of appeals held that petitioner's arguments were foreclosed by *United States v. Mang Sun*

[3] Petitioner also challenged the legality of his arrest at the airport and the sufficiency of the evidence to convict him at trial, issues that he does not press in this Court.

Wong, 884 F.2d 1537, 1546 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1140 (1990) (defendant's personal, verbal consent waived any appellate challenge), and *United States v. Musacchia*, 900 F.2d 493, 501-03 (2d Cir. 1990) (rejecting futility argument). Pet. A. 1a-4a. The panel failed to address Peretz's adequacy-of-waiver and jurisdictional arguments. Subsequently, Peretz's petition for rehearing *en banc* was denied. Pet. A. 5a-6a.

Peretz's petition for certiorari suggested that the matter be held pending the Court's resolution of similar issues raised in *United States v. France*, 886 F.2d 223 (9th Cir. 1989), *cert. granted*, 110 S. Ct. 1921 (1990), which was argued in October, 1990. When the Court divided 4-4 in *France* on January 22, 1991, it simultaneously granted certiorari in this case to again try to resolve post-*Gomez* issues that have badly fractured the circuit courts.[4] Petitioner's motion to proceed *in forma pauperis* also was granted.

---

[4] The first and ninth circuits have held that *Gomez* stated a jurisdictional rule that applies regardless of whether the defendant lodged a contemporaneous objection, and that, in any event, there is no waiver of appellate rights where objection would be futile. *United States v. Martinez-Torres*, 912 F.2d 1552 (1st Cir. 1990) (en banc); *United States v. France*, 886 F.2d 223 (9th Cir. 1989), *aff'd by an equally divided court* (Jan. 22, 1991). Both courts also have held that reversal is required where the defendant's "consent" was not knowing, intelligent, voluntary, and explicit. *United States v. Aikins*, 912 F.2d 285 (9th Cir. 1990), *modified*, 923 F.2d 650 (9th Cir. 1991); *Martinez-Torres*, 912 F.2d at 1556 (also requiring consent to be written).

The third circuit, while agreeing that *Gomez* stated a jurisdictional rule, disagreed that a magistrate lacks jurisdiction to preside when the defendant consents. *Government of the Virgin Islands v. Williams*, 892 F.2d 305 (3d Cir.), *cert. denied*, 110 S. Ct. 2211 (1990). The seventh circuit has assumed that delegation to a magistrate is error, but has suggested that the error does not warrant reversal under the plain error rule and is not jurisdictional. *United States v. Wey*, 895 F.2d 429 (7th Cir. 1990). However, in *United States v. Lake*, 910 F.2d 414, 417 (7th Cir.), *cert. denied*, 110 S. Ct. 3283 (1990), the same court implied a constitutional requirement of an explicit, knowing waiver.

The second circuit initially took the position that the procedure was error under *Gomez* but was not "plain error," *see United States v. Mang Sun Wong*, 884 F.2d 1537 (2d Cir. 1989) (explicit verbal consent), *cert. denied*, 110 S. Ct. 1140 (1990); *United States v. VanWort*, 887 F.2d 375, 382-83 (2d Cir. 1989) (failure to object equated with explicit consent), *cert. denied sub nom. Chapoteau v. United States*, 110 S. Ct. 1927 (1990), but has since held that jury selection with the defendant's consent is proper and that, to preserve an objection, the defendant must make a formal, written pretrial motion under Fed. R. Crim. P. 12(b)(1). *See United States v. Musacchia*, 900 F.2d 493, 502-03 (2d Cir. 1990); *United States v. Alvarado*, 923 F.2d 253, 1991 U.S. App. Lexis 638 (2d Cir. 1991) (on remand) ("approved" practice). Yet, the same court, equating the right to trial before a district judge with the right to trial by jury, later granted the *government's* writ of mandamus to prevent a district judge, post-*Gomez*, from delegating jury selection to a magistrate with the defendant's consent. *In re United States (Sayeedi)*, 903 F.2d 88 (2d Cir. 1990).

SUMMARY OF THE ARGUMENT

I. In *Gomez v. United States*, 109 S. Ct. 2237 (1989), this Court unanimously held that federal magistrates are not empowered to preside at the *voir dire* for a felony trial, and that, where the defendant has objected, he is entitled to have his conviction reversed. The Court's painstaking review of the history and the structure of the Federal Magistrates Act, 28 U.S.C. §§ 631-636, found no evidence that Congress ever intended magistrates to perform such a critical, essentially unreviewable adjudicatory function, but found overwhelming evidence to the contrary. Following *Gomez*, the Solicitor General repeatedly has conceded before this Court, and the government conceded in the court below, that such a delegation is error, even where the defendant consents.

While two circuits have disagreed with this conclusion, one without any reasoning and the second in reliance upon the Act's "additional duties" clause, § 636(b)(3), their position is untenable. Section 636(b)(3) authorizes "[a] magistrate to be assigned such additional duties as are not inconsistent with the Constitution and laws of the

United States." However, as noted above, *Gomez* narrowly construed this language so as not to negate the balance of the statute, which carefully delineated magistrates' duties, including the scope of their consent trial jurisdiction. Additionally, even with the defendant's "consent," magistrate-conducted felony *voir dire* is "inconsistent" with the Federal Rules of Criminal Procedure, which have the effect of law, and which authorize only a district judge to preside at jury selection and at all other phases of a felony trial. Finally, magistrate-conducted felony *voir dire* presents divisive constitutional issues of a nature—separation of powers—that this Court always seeks to avoid reaching unnecessarily. Thus, the Court should construe the statute to preclude magistrates from performing this function regardless of whether the defendant "consents."

II. Art. III requires that the "judicial power" of the United States be exercised by judges whose independence is assured because they have life tenure and an irreducible salary. An individual litigant can complain on appeal that he has been unfairly deprived of his personal right to Art. III adjudication, or that a structural violation of Art. III has occurred which no individual litigant is competent to protect, and which therefore can never be "waived" by a party. In this case, petitioner asserts violation of both individual and structural concerns.

Regarding the structural question, the Court has recognized two general exceptions to the basic Art. III requirement that the "judicial power" be personally exercised by Art. III judges: Congress' constitutional authority to permit non-Art. III "legislative" courts to adjudicate disputes connected to regulatory schemes, and its authority to permit preliminary adjudicatory functions to be performed by Art. III "adjuncts," subject to independent review by the Art. III district court. Because the "legislative" court exception directly clashes with structural values underlying Art. III, the Court has had to weigh the competing constitutional interests by means of a balancing test. *See Commodity Futures*

Trading Commission v. Schor, 478 U.S. 833 (1986). The *Schor* analysis does not apply here because the Magistrates Act does not create "legislative" courts but "inferior" or "adjunct" officers within the judicial branch.

In evaluating the constitutionality of an adjunct scheme, the Court relies upon the degree to which independent decisionmaking is reserved to the district court in relation to the importance of the adjudicatory function under Art. III. It has never upheld delegation of felony trial functions, but only preliminary evaluations of Social Security matters, *Mathews v. Weber*, 423 U.S. 261 (1976), and recommended dispositions of pretrial suppression motions subject to independent district court review, including *de novo* review where requested, *United States v. Raddatz*, 447 U.S. 667 (1980). In evaluating Art. III interests, *Raddatz* pointedly distinguished between a pretrial suppression hearing and the ultimate truth-seeking function at a criminal trial. *Id.* at 679.

Art. III interests certainly are at their zenith at a felony trial, of which jury selection is a "critical" first stage. *Gomez*, 109 S. Ct. at 2246-48. The *voir dire* process is integrally related to the trial's truth-seeking function, since it determines the factfinders who will in turn decide the ultimate question of the defendant's guilt or innocence. Because the judge's role at *voir dire* is inherently subjective and discretionary, *Gomez* seriously doubted that a district judge could ever conduct a meaningful independent review. 109 S. Ct. at 2247. Moreover, even if such a review could be conducted from a cold transcript—assuming, unlike in this case, that a transcript was prepared—the district judge could not requestion jurors, especially jurors who already had been excused and assigned to new trials, or otherwise correct prejudicial conduct by the participants without causing further prejudice or demeaning the entire process. *Id.* at 2247 & n.29. Because independent review of felony *voir dire* is impossible, the presiding magistrate acts impermissibly as a substitute judge rather than as a judge-assistant, in violation of Art. III.

Even if this Court applies the *Schor* balancing test, which heretofore has been applied only to test the constitutionality of "legislative" courts, allowing magistrates to preside at felony *voir dire* is inconsistent with Art. III. Congress' failure to specifically authorize magistrates to exercise this function shows that it had no interest in such a scheme. Congress' sole overall interest underlying the Magistrates Act—curtailing the Judiciary's budget by diverting work to less costly personnel—already is being accomplished by magistrates in other ways; there is no pressing need also to involve magistrates, in place of judges, at critical stages of a felony trial. On the other hand, the Art. III interests are substantial. At every stage of the prosecutorial process, from bail decisions through trial and sentencing, society has a vital interest in the independent application of federal criminal laws which individual parties, especially a criminal defendant, cannot be expected to protect. Magistrates, when called upon to make *de facto* final judgments at felony *voir dire*, are independent neither of the Legislative Branch, which ultimately controls their tenure, salary, and range of duties, nor of the judiciary. The risk-averse adjudication that magistrates' inherent insecurity will produce is counter to the Framers' notion of an independent federal judiciary "servant only to their conscience."

III. If the delegation of *voir dire* in this case did not satisfy statutory or constitutional prerequisites, then petitioner did not have to object to preserve his appellate rights. This is true, under the facts of this case, regardless of whether the Art. III rights involved are "waivable."

As an initial matter, if Congress has withheld authority from magistrates to preside at felony *voir dire* without regard to "consent" or "waiver," then a magistrate who nevertheless presides violates Art. III, since Congress alone can empower a court to exercise Art. III jurisdiction. It is basic that a party always can raise a defect going to the power or jurisdiction of the tribunal, at least on direct appeal, regardless of whether he objected below. The Court need not decide whether the entire trial was defective; it is enough to find that an incompetent tribunal presided throughout a "critical" stage of a felony trial. The same principle would apply if the Court found a structural Art. III violation.

On the other hand, as *Schor* and *Gomez* suggest, even if petitioner's personal Art. III rights were waivable, the Court's conclusion in *Gomez* that jury selection is a "critical" stage of trial, at which a defendant has a "basic" right to the presence of a competent tribunal, requires application of a rigorous waiver standard. Where the Court has required that a waiver of a "basic" or "fundamental" trial right be knowing, intelligent, or voluntary, it has placed the burden on the government to establish such a waiver. In such instance, the defendant is not required to make an affirmative objection to "preserve" his appellate rights.

The Magistrates Act itself incorporates the *Johnson v. Zerbst*, 304 U.S. 458 (1938), constitutional waiver standard for fundamental trial-related structural rights, both in the text of 18 U.S.C. § 3401 and in the legislative history. Moreover, the *Gomez* Court's analysis of the integral relationship between an impartial jury selection process and the truthseeking function of a criminal trial provides an independent constitutional basis for applying the same strict waiver standard. Held to this standard, the casual process followed in this case, in which counsel alone signalled "consent," with no on-the-record explanation to petitioner of the "right" being relinquished, did not waive petitioner's rights. Indeed, no relinquishment of a "known right or privilege" could have occurred when, at the time of petitioner's trial, the second circuit had announced to the world that there was no such right. Nor could the defendant's "consent" be deemed voluntary in light of the district court's inherently coercive request and the practice in the circuit, which *Gomez* illustrates, to delegate felony *voir dire* to magistrates even where the defendant objected. Thus, petitioner's right to the presence of a competent tribunal at felony *voir dire* was violated, and his conviction must be reversed.

ARGUMENT

I. THE FEDERAL MAGISTRATES ACT DOES NOT AUTHORIZE A MAGISTRATE TO PRESIDE AT JURY SELECTION FOR A FELONY TRIAL REGARDLESS OF WHETHER THE DEFENDANT 'CONSENTS'

Based upon a comprehensive analysis of the history and structure of the Federal Magistrates Act, 28 U.S.C. §§ 631-636, this Court unanimously concluded two years ago that Congress had not intended to empower federal magistrates to preside at the critical jury selection-phase of a felony trial. *Gomez v. United States*, 109 S. Ct. at 2245-46. While the defendants in *Gomez* had objected to this procedure, this fact was irrelevant to the Court's determination. *Gomez* thus controls irrespective of any purported "consent."

The Magistrates Act carefully delineates the specific functions that magistrates may exercise both in the pretrial, § 636(b)(1), and the trial, § 636(a)(3) and (c), context, and sets forth explicit procedures and standards for district court review. *See generally Gomez v. United States*, 109 S. Ct. at 2242-46; Brf. A. 3-5. While the statute also permits the district court to assign magistrates "additional duties not inconsistent with the Constitution and laws of the United States," 28 U.S.C. § 636 (b)(3), the Court in *Gomez* declined to give this language the literal construction urged by the government. "When a statute creates an office to which it assigns specific duties," the Court observed, "those duties outline the attributes of the office." 109 S. Ct. at 2241. Thus, the Court reasoned, Congress' "carefully defined grant of authority to conduct trials of civil matters and of minor criminal cases should be construed as an implicit withholding of the authority to preside at a felony trial." *Id.* at 2245. Since Congress almost certainly viewed jury selection as part of a felony trial, it must have intended to withhold authority for magistrates to provide over this critical function. *Id.* at 2246. But even if Congress had viewed jury selection as a pretrial matter, having prescribed review procedures for all other substantive pretrial functions, it would not have permitted magistrates to preside without any provision for *de novo* district court review. *Id* at 2246-47. Finally, the Court concluded:

> The absence of a specific reference to jury selection in the statute, or indeed, in the legislative history, persuades us that Congress did not intend the additional duties clause to embrace this function.

Id. at 2247 (footnote omitted).

The Solicitor General readily conceded in his written and oral presentations in *United States v. France* that jury selection by a magistrate in a felony case is error even when the defendant does not object.[5] The government made a similar concession in petitioner's case in the court of appeals. Gov't. Brf. 13 ("*Gomez* simply held that the Federal Magistrates Act does not permit district courts to delegate the jury selection function to a magistrate"). Nevertheless, the second circuit has "approved" this practice without identifying any source of authority under the Magistrates Act. *United States v. Musacchia*, 900 F.2d 493, 502-03 (2d Cir. 1990); *see supra* at 4, n.4. The third circuit, too, has approved the practice, relying upon the "additional duties" clause, § 636(b)(3). It has reasoned that *Gomez*'s statutory analysis was entirely premised upon this Court's desire to avoid constitutional issues which, in the third circuit's view, would be absent in a consent context. *Government of Virgin Islands v. Williams*, 892 F.2d 305, 308, 310 n.2 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 2211 (1990). We believe the third circuit has misread *Gomez*.

---

[5] *See, e.g.*, Brief for United States 7 ("[t]he delegation, even though error . . ."); *id.* at 21 ("we now know that magistrates are not authorized to conduct felony jury selection"); Reply Brf. 11 ("*Gomez* held that the Magistrate's Act does not authorize a magistrate to preside over jury selection"); Tr. of Oral Argument at 6 (". . . it is accepted, of course that Congress didn't authorize this procedure to be followed . . . and it is a right, we submit, to have a judge conduct jury selection").

While *Gomez* did note that a statute should be construed where possible to avoid constitutional issues, 109 S. Ct. at 2241, the Court "readily" (*id.*) concluded that Congress did not intend to authorize magistrates *ever* to preside at felony *voir dire* because that thesis was overwhelmingly supported by the statute's structure and history. Indeed, the Court's analysis did not identify a single circumstances suggesting a contrary legislative intent. Thus, the Court did not limit its "conclu[sion] that Congress . . . did not contemplate inclusion of jury selection in felony trials among a magistrate's additional duties," *id.* at 2245-46, to situations in which the defendant makes a timely objection.

Moreover, consent jurisdiction for felony *voir dire* would raise substantial constitutional issues involving separation of powers, which the Court has been especially concerned to avoid. *Public Citizen v. United States Department of Justice*, 109 S. Ct. 2258, 2272 (1989). The Court's "serious doubts that a district judge could review *voir dire* meaningfully." *see Gomez*, 109 S. Ct. at 2247, together with Art. III's textual requirement that the federal judicial power be exercised by Art. III judges, demonstrates the seriousness of the Art. III issue. *See* Point II, *infra*. The use of magistrates as "principal" rather than "inferior" officers to make essentially unreviewable final determinations in the selection of felony juries arguably would also violate the Appointments Clause, Art. II, § 2, cl. 2. *See infra* at 29 n.12. Moreover, the casual waiver by petitioner's counsel did not come close to satisfying the *Johnson v. Zerbst*, 304 U.S. 458 (1938), waiver standard for critical trial-related rights, which Congress expressly adopted, and which the Constitution surely requires, for waiver of a criminal defendant's basic right to the presence of an Art. III judge at trial. *See Gomez*, 109 S. Ct. at 2248; *infra* at Point III(B).

Finally, the "additional duties" clause does not empower magistrates to preside at jury selection because such a construction indeed would be "inconsistent with

. . . the laws of the United States," specifically, the Federal Rules of Criminal Procedure, which are "as binding as any statute duly enacted by Congress." *Bank of Nova Scotia v. United States*, 108 S. Ct. 2369, 2374 (1988). *See also United States v. Hvass*, 355 U.S. 570, 575 (1958) ("[t]he phrase 'a law of the United States,' as used in the perjury statute, is not limited to statutes, but includes [the federal rules]"). The rules authorize only a district court judge, to the exclusion of magistrates, to preside at a felony trial, or at the very least they are "inconsistent" with the notion of a magistrate presiding at the jury selection phase of such a trial.

Rules 23-31, relating to "Trial," authorize a 'court" or a "judge" to perform trial-related functions—one of which is empanelment of the jury under Rule 24 (reproduced at Brf. A. 6)—but do not refer to magistrates. This is a significant omission, in that Rule 1 ("Scope") (Brf. A. 6) provides that the rules apply to magistrates only when "specifically provided in one of the rules." *See, e.g.*, Fed. R. Crim. P. 3, 4, 5, 5.1, 9, 32.1, 40, 41. *See also* Fed. R. Crim. P. 54(c) (separately defining "court", "judge" and "magistrate"); 28 U.S.C. § 132(b) (not including magistrate within definition of "district court"). Congress could have chosen to include magistrates within the definition of "court" or "judge" in order to authorize magistrates to substitute for district judges generally, or even specifically with respect to jury selection under Rule 24, but evidently chose not to do so. *Compare* Fed. R. Evid. 1101(a) ("[t]he terms 'judge' and 'court' in these rules include . . . United States magistrates").

Similarly, Rule 25(a) (Brf. A. 6) is inconsistent on two grounds with delegation of felony *voir dire* to a magistrate for the mere convenience of the district court, which is the procedure's sole rationale. First, Rule 25(a) permits one "judge" to substitute for another during the trial only "by reason of death, sickness or other disability," and then only where the successor judge certi-

fies familiarity with the record. Thus, a magistrate cannot conduct jury selection merely for the district judge's convenience without any provision for the judge, before substituting for the magistrate for the balance of the trial, to "certify[] familiarity with the record." Second, the assumption underlying Rule 25(a), which refers only to a "judge" presiding at trial, is that a "judge" is the officer who commences a trial and is replaceable only by another "judge." This terminology is plainly inconsistent with the notion of a magistrate commencing the trial by conducting the *voir dire*. " 'Judge of the United States' . . . is used in the rules to indicate that only a judge (not to include a United States magistrate) is authorized to act." 1972 Advisory Committee Notes, 18 U.S.C.A. Rule 54 (West 1976) at 626-27. Only if jury selection is understood to be a *pretrial* function can Rule 25(a) be reconciled with the use of a magistrate, but the unanimous Court in *Gomez* stated that Congress almost surely believed that *voir dire* was part of the trial itself. 109 S.Ct. at 2246.

The Court's holding in *Wingo v. Wedding*, 418 U.S. 461 (1974), directly supports this point. In that case, the Court invalidated the assignment of a habeas corpus hearing to a magistrate under an identically-worded "additional duties" clause because such an assignment was inconsistent with the Habeas Corpus Act, which required such hearings to be conducted by "[t]he court, or justice, or judge." *Id.* at 466-67 (citing Rev. Stat. § 761, 28 U.S.C. § 461 (1940 ed.)). While the 1976 amendments to the Magistrates Act were intended to "overrule" *Wingo v. Wedding* by explicitly authorizing magistrates to conduct habeas corpus hearings—and all *pretrial* proceedings under § 636(b)(1)—"[n]otwithstanding any provision of law to the contrary," *see Gomez*, 109 S. Ct. at 2243 n.14; H.R. Rep. No. 1609, 94th Cong., 2d Sess. 9 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 6162, 6169, this clause did not also modify the "additional duties" authorized by § 636(b)(3). Thus, *Wingo v. Wedding*'s reasoning remains valid with respect to any function assigned pursuant to the "additional duties" clause.

Finally, even if the Court concluded that Congress intended to authorize magistrates to exercise consent jurisdiction over felony *voir dire*, such "consent," as a matter of statutory as well as constitutional interpretation, must be obtained personally from the defendant, in writing, under the "knowing, intelligent, and voluntary" waiver standard of *Johnson v. Zerbst*, 304 U.S. 458 (1938), which Congress expressly adopted. *See* Point III(B), *infra*. Petitioner's counsel's "consent" did not meet this standard, *see* Point III(C), *infra*, which is a statutory prerequisite to a magistrate's exercise of trial jurisdiction. *See Gomez*, 109 S. Ct. at 2245 ("magistrate's criminal trial jurisdiction depends on the defendant's specific, written consent"). *See infra* at 39-40 & n.22.

II. A CRIMINAL DEFENDANT MAY NOT CONSENT TO A MAGISTRATE'S EXERCISE OF ARTICLE III 'JUDICIAL POWER' AT A FELONY TRIAL

Despite Art. III's textual requirement that officers exercising the "judicial Power of the United States" enjoy lifetime tenure and an irreducible salary, a federal magistrate without these guarantees of independence selected the jury in petitioner's case, with no statutory provision for, and no *de facto* means of, *any* review by an Art. III judge. For this reason, the broad constitutional issue the Court has framed—whether Art. III permits magistrates to exercise consent jurisdiction over felony *voir dire*—requires a negative answer.[6]

"The inexorable command of [Art. III] is clear and definite: The judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III." *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58-59 (1982) (plural-

[6] The relevant provisions of Art. III are reproduced at Brf. A. 1a.

ity opinion). There are two broad exceptions to this general requirement that adjudicatory powers be exercised only by Art. III judges. The first concerns the delegation of jurisdiction to "legislative" or non-Art. III courts, and the second involves the delegation of adjudicatory functions to court "adjuncts." *See* Note, *The Boundaries of Article III: Delegation of Final Decision-making Authority to Magistrates*, 52 U. Chi. L. Rev. 1032, 1038-45 (1985) (hereinafter "Chicago Note").

A magistrate assigned to conduct felony *voir dire* acts as a court adjunct. *See infra* at Point II(A). To be constitutional, court adjuncts must be subject to meaningful review by an Art. III judge. *See infra* at Point II(B). However, even if this Court determines that magistrates fall under the "legislative" tribunal exception to Art. III, or chooses to extend to magistrates the balancing test for "legislative" courts it used in *CFTC v. Schor*, the power to conduct felony *voir dire* is constitutional only if the Art. III interests implicated are outweighed by Congress' interest in permitting adjudication by a non-Art. III official. *See infra* at Point II(C).

A. Magistrates Purport to Act as Article III-'Adjuncts' When Conducting Felony *Voir Dire*

It has long been recognized that Art. III judges need not perform all adjudicatory functions. Congress may establish non-Art. III tribunals to adjudicate disputes arising out of Congress' attempt to carry out specific grants of Constitutional authority to regulate conduct in the territories or the military, to enforce "public" as opposed to purely "private" rights, or to implement specialized regulatory schemes. *See generally* Chicago Note at 1038-42. However, Congress' "power to place adjudicative authority in non-Article III tribunals is circumscribed." *Granfinanciera, S.A. v. Nordberg*, 109 S. Ct. 2782, 2796 (1989). Claims adjudicated in such tribunals must be "closely intertwined with a federal

regulatory program Congress has power to enact." *Id.* at 2797. Congress may not "create courts free of Art. III's requirements whenever it finds that course expedient." *Northern Pipeline*, 458 U.S. at 73.

The limitation upon Congress' power to create non-Art. III tribunals is especially strict in the criminal context. It has long been assumed that, with the exception of the aforementioned territorial and military courts established under Congress' specific Art. I or Art. IV powers, Congress may not empower a non-Art. III tribunal to preside at a felony trial. Thus, in *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14 (1955), the Court held that Congress could not empower military tribunals to exercise criminal jurisdiction over ex-servicemen even for crimes committed while the defendant was on active duty. *See O'Callahan v. Parker*, 395 U.S. 258 (1969) (non-service-connected crimes by soldier must be tried in civilian court); *Reid v. Covert*, 354 U.S. 1 (1957) (civilian dependents of members of the armed forces stationed overseas cannot be tried in a military court). In *Palmore v. United States*, 411 U.S. 389 (1973), the Court upheld the exercise of criminal jurisdiction by Art. I courts created to adjudicate local prosecutions in the District of Columbia, but suggested that Congress could not create Art. I criminal jurisdiction where "laws of national applicability and affairs of national concern are at stake." *Id.* at 408. *See Northern Pipeline*, 458 U.S. at 76. The Court has declared that "the public-rights doctrine does not extend to any criminal matters." *Id.* at 70 n.24. Referring to private civil adjudications of traditional common law claims, "and all criminal matters, with the narrow exception of military crimes," the Court has stated: "There is no doubt that when the Framers assigned the 'judicial Power' to an independent Art. III Branch, these matters lay at what they perceived to be the protected core of that power." *Id.* at 70 n.25. Thus, the power to adjudicate a case such as petitioner's involving application of a federal criminal stat-

ute of national applicability cannot be conferred upon an alternative, non-Art. III tribunal.

However, the office of magistrate does not function as an Art. I or "legislative" court. Rather, Congress expressly created the magistrate as "an adjunct of the United States District Court." H.R. Rep. No. 287, 96th Cong., 1st Sess. 8 (1979). Magistrates are subject to appointment and removal by the judiciary, 28 U.S.C. § 631(a) and (i), and are classified as employees of the judicial branch. 28 U.S.C. § 634(c). This Court has treated magistrates under the "adjunct" model. *See Northern Pipeline*, 458 U.S. at 79; *Raddatz*, 447 U.S. at 681-82. Nevertheless, a realistic assessment of the magistrate's role, not its characterization by Congress, must control Art. III analysis. *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 544 (9th Cir. 1984) (en banc) (Kennedy, J.), *cert. denied*, 469 U.S. 824 (1984). Because a magistrate's conduct of the critical jury selection stage of a felony trial is not susceptible to independent district court review, the magistrate exercises *de facto* judicial power, functioning as a judicial clone rather than "adjunct"-assistant, in violation of Art. III.

B. Because a Magistrate's Conduct of Felony *Voir Dire* is Immune From Meaningful Independent Review by the District Court, the Magistrate's Role is Unconstitutional Under the 'Adjunct' Model

"Judicial power" conferred on the courts by Art. III is the right or duty to determine "cases and controversies" —"the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs." *Muskrat v. United States*, 219 U.S. 346, 357 (1911). While the Court has upheld the use of magistrates as well as administrative tribunals to assist the district courts in preliminary factfinding or in the determination of preliminary civil and criminal matters, it

has never sanctioned the *substitution* of such assistants for district judges in the ultimate determination at a felony trial of "cases and controversies" subject to the judicial power.

In *Mathews v. Weber*, 423 U.S. 261 (1976), the Court, while not reaching any constitutional issue, merely sanctioned the use of magistrates to conduct a "preliminary review" of records regarding medicare reimbursement under the Social Security Act for the purpose of doing "no more than propos[ing] a recommendation" which the district judge was "free to follow . . . or wholly to ignore." *Id.* at 270-71. "The authority—and the responsibility—to make an informed, final determination, we emphasize, remains with the judge." *Id.* at 271. The Court "categorically reject[ed] the suggestion that judges will accept, uncritically, recommendations of magistrates." *Id.* at 274.

In *United States v. Raddatz*, 447 U.S. 667 (1980), the Court rejected a constitutional attack upon the use of magistrates to hear and to recommend dispositions of pretrial suppression motions in criminal cases. The Act's detailed scheme withstood the Court's scrutiny because it requires magistrates to "submit to a judge of the court *proposed* findings of fact and *recommendations* for the disposition, *by a judge of the court*," of the motion, 28 U.S.C. § 636(b)(1)(B) (emphasis added), and grants the parties *de novo* review of the matters to which they make specific objection. This statutory scheme does not violate Art. III, the Court held, "so long as the ultimate decision is made by the district court." 447 U.S. at 683.

In his concurring opinion, Justice Blackmun further emphasized the necessity for the Art. III judge to exercise a meaningful role:

> We do not face a procedure under which 'Congress [has] delegate[d] to a non-Art. III judge the authority to make final determinations on issues of fact.' *Post*, at 703 (dissenting opinion). Rather, we confront a procedure under which Congress has

> vested in Art. III judges the discretionary power to delegate certain functions to competent and impartial assistants, while ensuring that the judges retain complete supervisory control over the assistants' activities.

Id. at 686 (concurring opinion).

Even in the administrative adjunct cases, the Court also has been careful to reserve for the Art. III judiciary the power ultimately to determine the constitutional or Art. III issues presented, although the district judge may defer to factual determinations of "public rights" by specialized administrative or "legislative" tribunals created by Congress under Art. I. *Granfinanciera, S.A. v. Nordberg*, 109 S. Ct. at 2796. Thus, in *Crowell v. Benson*, 285 U.S. 22 (1932), the Court required that a district judge make an independent determination of facts relating to an administrative agency's jurisdiction to adjudicate a maritime dispute. While the Court subsequently cut back on *Crowell* by holding that, in reviewing the factual findings of an "expert legislative agency" against a constitutional claim, a district judge could exercise his discretion to accept such "expert" findings without conducting a new hearing, the Court did not relieve the district judge of his "judicial duty to exercise an independent judgment." *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 53 (1936) (quoted in *Raddatz*, 447 U.S. at 683).

In *Northern Pipeline*, the plurality enforced the principle that "adjuncts" must assist, not replace, Art. III judges by invalidating the Bankruptcy Act of 1978, which created what Congress termed an "adjunct" court to determine bankruptcy-related matters, subject only to appeal to an Art. III court. In its analysis, the Court initially pointed out that it had "sustained the use of adjunct factfinders . . . so long as those adjuncts were subject to sufficient control by an Art. III district court." 458 U.S. at 78-79. Thus, it was "[c]ritical" (*id.* at 83) in *Raddatz* that "the ultimate decisionmaking authority

respecting all pretrial motions clearly remained with the district court." *Id.* at 79. Indeed, the Court observed that Congress may only authorize assignment of "limited adjudicatory functions" to adjuncts. *Id.* at 77 n.29. The Court stressed that review of an adjunct scheme must consider the "critical difference between rights created by federal statute and rights recognized by the Constitution," *id.* at 83, and further noted:

> [S]ubstantial inroads into functions that have traditionally been performed by the Judiciary cannot be characterized merely as incidental extensions of Congress' power to define rights that it has created. Rather, such inroads suggest unwarranted encroachments upon the judicial power of the United States, which our Constitution reserves for Art. III courts.

Id. at 84.

Regardless of how Congress had characterized the function of the bankruptcy court, the Court continued, by authorizing it to "exercise all ordinary powers of district courts, including the power to preside over jury trials," subject to Art. III review only by a " 'clearly erroneous' standard," Congress had left the district court's role a "facade." *Id.* at 85-86. In this regard, the Court rejected "the proposition that Art. III is satisfied so long as some degree of appellate review is provided," explaining: "Our precedents make it clear that the constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal, where the court is restricted to considerations of law, as well as the nature of the case as it has been shaped at the trial level." *Id.* at 86 n.39; *see Crowell*, 285 U.S. at 57.

Because the "adjunct" scheme in this case involves the *trial* of a felony case, as opposed to pretrial civil (e.g., *Mathews*) or criminal (e.g., *Raddatz*) proceedings or a private civil dispute related to a specialized regulatory scheme (e.g., *Northern Pipeline*), Art. III scrutiny must be at its zenith.

The Framers left no doubt that they viewed criminal trials as the ultimate exercise of Art. III power. Art.

III safeguarded the right to trial by jury in criminal cases only. As Alexander Hamilton explained:

> . . . I must acknowledge that I cannot readily discern the inseparable connection between the existence of liberty and the trial by jury in civil cases. Arbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions have ever appeared to me to be the great engines of judicial despotism; and these have all relation to criminal proceedings. The trial by jury in criminal cases, aided by the *habeas corpus* act, seems therefore to be alone concerned in the question.

Federalist No. 83 (A. Hamilton) (New American Library ed. 1961), at 499. *See id.* at 508 ("the security of liberty is materially concerned only in the trial by jury in criminal cases").

While the result of a pretrial suppression or other motion may "determine the outcome of the case," *Raddatz*, 447 U.S. at 678, the government argued in *Raddatz*,[7] and the Court agreed, "that the interests at stake . . . are of a lesser magnitude than those in the criminal trial itself." *Id.* at 679. "We have repeatedly pointed out," the Court stated, "that the interests underlying a voluntariness hearing do not coincide with the criminal law objective of determining guilt or innocence" and have " 'nothing whatever to do with improving the reliability of jury verdicts.' [*Lego v. Twomey*, 404 U.S. 477, 486 (1972)]." *Raddatz*, 447 U.S. at 678 (footnote omitted). Pretrial suppression procedures evolved long after the Constitution was adopted as a means principally to regulate conduct by the police during the investigatory, as opposed to the accusatory, stage of the criminal process. *United States v. Leon*, 468 U.S. 897, 906 (1984); *Johnson v. New Jersey*, 384 U.S. 719, 730-31 (1966).

[7] The primary interest at stake in a suppression hearing is "deterrence of official misconduct" rather than "the accused's paramount interest in liberty" that is at stake at the trial. Brf. for United States 45, *United States v. Raddatz*, 447 U.S. 667 (1980). "[T]he suppression remedy is ordinarily concerned with the deterrence of official misconduct or other societal interests and not with the more fundamental determination of guilt or innocence." *Id.* "Indeed, the defendant's stake in the outcome of a suppression hearing is significantly less than the individual interests implicated by various civil proceedings." *Id.* at 46.

In contrast, this Court hardly needs reminding of the importance of felony *voir dire*: "the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, radical, or political prejudice." *Gomez*, 109 S. Ct. at 2246 (citations omitted). *See, e.g., Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981). Rejecting the Solicitor General's trivialization of the process,[8] the Court in *Gomez* stated:

> Far from an administrative impanelment process, *voir dire* represents jurors' first introduction to the substantive factual and legal issues in a case. To detect prejudices, the examiner—often, in the federal system, the court—must elicit from prospective jurors candid answers about intimate details of their lives. The court further must scrutinize not only spoken words but also gestures and attitudes of all participants to ensure the jury's impartiality. See, *e.g., Wainwright v. Witt*, 469 U.S. 412, 428, n.9 (1985) (quoting *Reynolds v. United States*, 98 U.S. 145, 156-57 (1879)).

Gomez, 109 S. Ct. at 2247.[9]

The power to select the jury itself is integral to the ultimate criminal law objective of "improving the reliability of jury verdicts," which depends upon the pres-

[8] *See* Brief for United States 34, *Gomez v. United States*, *supra* ("the *voir dire* process in the federal system consists for the most part of excusing prospective jurors when, in response to a question, they expressly acknowledge their inability to be impartial").

[9] Notwithstanding this resounding rejection of its argument, the Solicitor General in *United States v. France* again belittled *voir dire*, arguing that there was no constitutional distinction between the practice of having clerks initially screen prospective jurors for various disqualifying causes and "the screening process that occurs during *voir dire*." Reply Brief for United States 13 n.10.

ence of "an impartial adjudicator." *Gomez*, 109 S. Ct. at 2248 (quoting *Gray v. Mississippi*, 481 U.S. 648, 668 (1987)). *See Brown v. Louisiana*, 447 U.S. 323, 334 (1980) ("Any practice that threatens the jury's ability properly to perform [its truth-determining] function poses a . . . threat to the truth-determining process itself."). The delegation to magistrates of this "critical stage" of trial, *Gomez*, *supra*, thus implicates fundamental Art. III interests. The regular use of such a procedure would make "substantial inroads into functions that have traditionally been performed by the Judiciary." *Northern Pipeline*, 458 U.S. at 84. It is thus essential that, at the very least, the district judge make a "final determination" regarding the fitness of the jury to serve by conducting an independent review of the process by which the magistrate selected the panel.

However, such a review not only is inherently impossible; the statute does not authorize it, and the judge in petitioner's trial did not offer to, let alone conduct, it. Thus, the magistrate's exercise of authority was "final"; he, not the judge, exercised the "judicial power."

The Court's unanimous opinion in *Gomez* expressed "serious doubts that a district judge could review this function meaningfully." 109 S. Ct. at 2247. After reviewing the inherently subjective nature of the *voir dire* process, the Court noted that "only words can be preserved for review; no transcript can recapture the atmosphere of the *voir dire*, which may persist throughout the trial." *Id.* Indeed, the Court previously has likened the trial judge's factfinding role during *voir dire* to

> . . . that of the jurors later on in the trial. Both must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and of responses to questions. See *Ristaino v. Ross*, 424 U.S. 589, 595 (1976) (quoting *Rideau v. Louisiana*, 373 U.S. 723, 733 (1963) (Clark, J., dissenting). In neither instance can an appellate court easily second-guess the conclusions of the decisionmaker who heard and observed the witnesses.

Rosales-Lopez v. United States, 451 U.S. at 188. Thus, the trial court must be "accorded ample discretion in determining how to conduct *voir dire*," *id.* at 189, with resolution of questions concerning the credibility and demeanor of a prospective juror entitled to " 'special deference.' " *Patton v. Yount*, 467 U.S. 1025, 1038 & n.14 (1984) ("Demeanor plays a fundamental role not only in determining juror credibility, but also in simply understanding what a potential juror is saying."). A district court reviewing a *voir dire* transcript, like an appellate court, would necessarily have to defer to the subjective perceptions and ruling of the magistrate.

Besides focusing on the qualifications of individual jurors, the court at *voir dire* also must be sensitive to group dynamics, such as whether a prejudicial comment has had an effect upon the entire venire, or whether a panel has been tainted by pretrial publicity. *Irvin v. Dowd*, 366 U.S. 717 (1961). The court may have to evaluate whether to apply a controversial or expensive remedy, such as outright dismissal, change of venue, sequestration of jurors, closure of the proceeding, or postponement of the trial. *See, e.g., Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 512-13 (1984). It also may have to evaluate a prosecutor's subjective motivations in exercising peremptory challenges, a function that impacts upon separation of powers, given the prosecutor's status as a representative of the Executive Branch. *Batson v. Kentucky*, 476 U.S. 79, 96-97 (1986).

Aside from discrete errors identifiable from the face of a transcript, the proceedings at jury selection may impact the balance of the trial in a manner that neither the parties nor a reviewing district judge could possibly anticipate. Evaluation of subsequent taint or misconduct allegations requires the trial judge to consider a juror's behavior and personality as revealed during *voir dire*, as well as the candor of his *voir dire* disclosures. *See, e.g., Smith v. Phillips*, 455 U.S. 209, 212 n.4 (1982) (nondisclosure of juror's midtrial employment application to

prosecutor's office did not require new trial where trial court had relied upon that juror's detailed *voir dire* disclosure of his general law enforcement background and interest); *United States v. Hernandez*, 862 F.2d 17 (2d Cir. 1988) (conviction reversed where trial court erroneously disqualified holdout juror for personality quirks that had been apparent during the *voir dire*). In preparing his charge, in ruling upon a defendant's objection that other-crime, impeachment or co-conspirator hearsay evidence would unfairly prejudice, confuse or mislead the jury, Fed. R. Evid. 403, 404(b), 608(b), 609, in weighing the need for and effectiveness of remedial measures such as limiting instructions, Fed. R. Evid. 105, or a mistrial, Fed. R. Crim. P. 14, the trial judge must rely upon his knowledge of the juror's intellectual and emotional functioning. His absence during jury selection may affect his control of the trial, and "is apt to make the jury less attentive to the judge during the trial, and the judge less sensitive to the problems of the individual jurors, as well as to the overall chemistry of the jury itself." *United States v. Garcia*, 848 F.2d at 1337 (Oakes, J., dissenting).

Even if a procedure could be devised for the district court to identify erroneous actions by a magistrate during *voir dire*, there would be no effective means for redressing them. The district judge could not know the full effect, which "may persist throughout the trial," *Gomez*, 109 S. Ct. at 2247, of an erroneous instruction or a prejudicial remark. Nor could he effectively requestion specific jurors or the group. "[A]s a practical matter a second interrogation might place jurors on the defensive, engendering prejudices irrelevant to the facts adduced at trial." *Gomez*, 109 S. Ct. at 2247 n.29. By the time a transcript was prepared and reviewed by the district court, challenged jurors already would have been reassigned to other courtrooms or excused altogether from further service. Meanwhile, respective counsel's selection strategies would have been unalterably affected. Finally, such a review process would emphasize the court's view of

the critical *voir dire* process as "essentially clerical." *United States v. Garcia*, 848 F.2d at 1337 (Oakes, J., dissenting) (cited approvingly in *Gomez*, 109 S. Ct. at 2247 n.29).

The reviewability of jury selection and of the pretrial procedures that were at issue in *Mathews* and *Raddatz* "differs palpably." *Gomez*, 109 S. Ct. at 2247 n.29. In *Mathews*, the Court merely upheld magistrates' "preliminary review—which district judges easily may examine before making a final decision—of 'closed administrative record[s]' in Social Security cases." *Id.* In *Raddatz*, the Court approved a careful statutory scheme providing for an independent district court determination in all cases, ample opportunity for the parties to obtain and review a hearing transcript and to make considered, written objections, and *de novo* review where requested. In contrast to the *voir dire*, a district judge can rehear suppression hearing testimony without concern for "engendering prejudices irrelevant to the facts adduced," *Gomez*, 109 S. Ct. at 2247 n.29, the group dynamics of a jury, or any inseparable relationship between the hearing and the trial.

Because a district judge cannot meaningfully review or correct *voir dire* conducted by a magistrate, the magistrate's role is, in effect, to make a "final determination." The magistrate conducts the substantive role of selecting the jury that will determine the ultimate question of guilt or innocence, and then refers the panel to the district judge to exercise the ministerial role of swearing it in. Under this perverse scheme, the magistrate exercises the "judicial power"; the Art. III judge becomes a functionary.[10]

---

[10] The second circuit's recent decision on remand in *United States v. Alvarado*, 923 F.2d 253, 1991 U.S. App. Lexis 638 (2d Cir. 1991), perfectly illustrates this irony. This Court had vacated the court of appeals' denial of the defendant's *Batson* claim for reconsideration, 110 S. Ct. 2995 (1990), *vacating* 891 F.2d 439 (2d Cir. 1989). Upon remand, the court of appeals recognized that "the ultimate issue of whether discrimination has been shown, falls primarily

Nevertheless, the Court need not decide whether *any* statutory review procedure could possibly satisfy the Art. III requirement that the district court independently determine the composition of the jury. It merely need hold that § 636(b)(3), under which a magistrate may preside at felony *voir dire* without any "procedural guidance or judicial review," *Gomez*, 109 S. Ct. at 2246, violates Art. III.

The Court cannot "fairly" construe this statute to save its constitutionality by incorporating review procedures that Congress pointedly omitted. *Crowell v. Benson*, 285 U.S. 22, 62 (1932). *See Schor*, 478 U.S. at 841; *Fuentes v. Shevin*, 407 U.S. 67, 96-97 (1972) (legislature, not courts, must promulgate hearing procedure to save constitutionality of statute). *Gomez* concluded that jury selection is a "dispositive"-type matter for which *de novo* review must be provided, 109 S. Ct. at 2246, but Congress only authorized *de novo* review for the functions specified in § 636(b)(1)(B). The 1976 amendment that incorporated this provision into the Act was intended to "emphasize[] and clarif[y] when a de novo determination must be made by the judge." H. R. Rep. No. 1609, at 3, *reprinted in* 1976 U.S. Code Cong. & Admin. News, at 6163. Since Congress deliberately withheld any review structure for the functions authorized by § 636(b)(3), including felony *voir dire*, it is for Congress to rewrite the statute, not the courts. *See Aptheker v. United States*, 378 U.S. 500, 515 (1964).

---

upon the judicial officer conducting the jury selection, whose determinations as to the credibility of the proffered explanations are entitled to 'appropriate deference.' *Batson*, 476 U.S. at 98 n.21." 1991 U.S. App. Lexis 638, at *10*. Since a magistrate had conducted the *voir dire*, the court of appeals remanded directly to the magistrate to exercise his "judicial" discretion in determining the credibility of the prosecutor's "race-neutral" explanation, and directed the district judge "either to reinstate the judgment of conviction or order a new trial, depending upon the Magistrate's findings." *Id.* at *12*. Under this role reversal, the magistrate will determine whether the defendant should receive a new trial; the district judge *qua* functionary will simply enter the magistrate's order.

Even if it is assumed *arguendo* that the district court could have promulgated a local rule under § 636(b)(4) to provide for independent review, it did not do so here. The sole authority for the delegation of felony *voir dire* to magistrates under the local rules was a general reference to "the duties set forth in 28 U.S.C. § 636." *Gomez*, 109 S. Ct. at 2239 n.3 (citing Fed. Local Ct. Rule 1 (E.D.N.Y. 1988)).[11] Nor, in the end, did the district judge conduct any review before swearing in the jury and beginning to receive testimony. Thus, in petitioner's trial, because the magistrate instead of the district judge exercised judicial power during the "critical" jury selection stage, Art. III was violated.[12]

---

[11] *Compare* 28 U.S.C. § 636(c)(2), requiring each district to promulgate local rules ensuring the voluntariness of litigant waivers in civil cases.

[12] If magistrates may exercise ultimate adjudicatory authority at the trial of a felony case, a serious Appointments Clause issue also arises, which petitioner may assert for the first time in this Court. *Glidden Company v. Zdanok*, 370 U.S. 530, 536-37 (1962). Under Art. II, § 2, cl. 2, "principal" officers, who include Art. III judges, must be appointed by the President with the "Advice and Consent of the Senate," while the "Courts of Law" may be empowered by Congress to appoint "inferior Officers, as they think proper." *See generally Morrison v. Olson*, 108 S. Ct. 2597, 2608-09 (1988); *Buckley v. Valeo*, 424 U.S. 1, 120-25 (1976). In *Buckley*, the Court explained that a "principal" officer is "any appointee exercising significant authority pursuant to the laws of the United States." *Id.* at 126. If magistrates may preside, without being subject to meaningful district court review, at felony trials, in addition to their explicit statutory authority to conduct all civil and misdemeanor trials with consent and to adjudicate all pretrial motions, they must be deemed "principal" officers, since their jurisdiction would not be substantially distinguishable from that of district judges. *See, e.g., Morrison, supra.* As for magistrates' tenure, they can hardly be viewed as "temporary" officers given their eight-year terms of office and their protection against removal by the judiciary except for cause. *Id.* Even without considering magistrates' felony trial jurisdiction, powerful dissenting voices have been heard that magistrates' civil trial jurisdiction goes too far to be consistent with the limitations of the Appointments Clause. *See Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1053 (7th Cir. 1984) (Posner, J., dissenting); *Pacemaker*

C. Even if the *Schor* Balancing Test Were Applied, Congress' Minimal Interest in the Delegation to Magistrates of Felony *Voir Dire* is Far Outweighed by the Harm to Article III Concerns

Even if the Court looks outside the "adjunct" model to the analysis it has applied to "legislative" courts, the delegation of felony *voir dire* to magistrates cannot be upheld. In *Schor* and in *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), the Court upheld Congress' exercise of Art. I power to set up specialized regulatory agencies with responsibility to adjudicate disputes arising directly out of substantive regulatory provisions as well as ancillary, common-law claims. Acknowledging its troubled history of attempts to reconcile Congress' exercise of Art. I regulatory responsibilities with the requirements of Art. III, *Schor*, 478 U.S. at 847, the Court established a pragmatic balancing test.[13] Under this new framework, in each case, Congress' Art. I interest in establishing an inexpensive, expeditious dispute resolution process for claims arising out of or ancillary to a specialized regulatory scheme must be weighed against the interests underlying Art. III. In both *Schor* and *Thomas*, the Court limited its holding to the situation presented: Congress' need to adjudicate claims incident to its regulatory scheme in an Art. I forum.[14]

Diagnostic Clinic of America v. Instromedix, Inc., 725 F.2d 537, 549-50 (9th Cir. 1984) (en banc) (Schroeder, J., dissenting).

[13] The *Schor/Thomas* "pragmatic" approach has been criticized within the court, *see Granfinanciara, S.A. v. Nordberg*, 109 S. Ct. 2782, 2805 (1989) (Scalia, J., concurring), and without, *see* Saphire, *Shoring Up Article III: Legislative Court Doctrine in the Post-CFTC v. Schor Era*, 68 B.U.L. Rev. 85 (1988).

[14] In *Thomas*, the Court stated: "Our holding is limited to the proposition that Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly 'private' right that is so closely integrated into a regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." 473 U.S. at 593-94. In *Schor*, the Court's holding was as follows: "We conclude that the limited jurisdiction that the CFTC asserts over state law claims as a necessary incident to the adjudication of federal claims willingly submitted by the parties for initial agency adjudication does not contravene separation of power principles or Article III." 478 U.S. at 857.

In this case, there is no clash between Art. III interests and a specific grant of a competing power to Congress under which Congress may create an administrative or "legislative" court. This case is simply about whether Congress may authorize the judiciary to assign ultimate adjudicatory authority in a felony case, which the text of Art. III requires to be exercised by a judge with life tenure and an irreducible salary, to an "adjunct"-assistant who, though within the judicial branch, lacks such guarantees of independence.

Even if *Schor*'s balancing approach were applied to this case, petitioner must prevail because the Art. III values at stake far outweigh Congress' sole interest: limiting the federal judiciary's budget. The principal structural interest underlying Art. III is protection of the power of the Judicial Branch against encroachment by a coordinate branch of government. *Schor*, 478 U.S. at 848. Magistrates are hired by the judges of the individual district, who also maintain general supervisory authority as well as the power in each instance to determine the appropriateness of assigning a particular function. Nevertheless, magistrates are susceptible to influence by the other branches. Congress twice has worked major amendments to the Act, and is free to reduce the number of magistrates' positions, reduce magistrates' salaries,[15] reduce their responsibilities, or even wrest away control over their hiring from the judiciary. Without the security of lifetime tenure, a magistrate desirous of reappointment or of promotion to a district court

---

[15] In 1983, a bill was proposed in Congress that would have reduced magistrates' annual salaries by about $15,000. *See* H.R. 3, 98th Cong., 1st Sess., *reprinted in Bankruptcy Court Act of 1983: Hearings on H.R. 3 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 215 (1983).

judgeship may be influenced by a desire to please a powerful United States Attorney, influential members of the private bar, or the local United States Senator.[16]

Also underlying Art. III is the recognition that since Colonial times, "especially in the administration of criminal justice, the means used to achieve justice must have the support derived from public acceptance of both the process and its results." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980). As Justice Brennan emphasized:

> Under our system, judges are not mere umpires, but, in their own sphere, lawmakers—a coordinate branch of *government*. While individual cases turn upon the controversies between parties, or involve particular prosecutions, court rulings impose official and practical consequences upon members of society at large. Moreover, judges bear responsibility for the vitally important task of construing and securing constitutional rights. Thus, so far as the trial is the mechanism for judicial factfinding, as well as the initial forum for legal decisionmaking, it is a genuine governmental proceeding.
>
> It follows that the conduct of the trial is preeminently a matter of public interest. . . .

Richmond Newspapers, 448 U.S. at 595-96 (concurring opinion) (footnote omitted).[17]

Especially in the context of criminal prosecutions, the Court repeatedly has recognized that the trial judge has a responsibility to protect societal interests which may

[16] That magistrates may view their position as a stepping-stone to a judgeship is illustrated by this case: the magistrate who presided during the *voir dire* has since been appointed a judge in the Eastern District of New York. This is not to imply that she was consciously influenced in any ruling by a desire for career advancement. Nevertheless, the potential for such influence is at odds with Art. III.

[17] Justice Brennan's comments are relevant here even though this is not a First Amendment case.

transcend the narrow concerns of the parties. Thus, in *Richmond Newspapers*, the Court held that the public's interest in an open trial may outweigh a defendant's desire, with the prosecutor's acquiescence, to avoid the public eye. Similarly, a federal judge may be required to disqualify defense counsel with a potential conflict of interest, despite the defendant's waiver, because of the court's "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat v. United States*, 108 S. Ct. 1692, 1697 (1988); *see also Faretta v. California*, 422 U.S. 806, 839 (1975) (Burger, J., dissenting) ("the integrity of and public confidence in the system are undermined, when an easy conviction is obtained due to the defendant's ill-advised decision to waive counsel"); Fed. R. Crim. P. 44(c). Societal interests in the outcome of criminal proceedings require a federal judge, regardless of the stipulations of the parties, to independently review plea (Fed. R. Crim. P. 11) and charge (Rule 48(a)) agreements, to consider any potential "danger to . . the community" posed by a defendant's pretrial release, 18 U.S.C. § 3142(b) and (g)(4), and, in imposing sentence, to consider the societal need to "promote respect for the law," deter others, and "protect the public." 18 U.S.C. § 3553; 28 U.S.C. § 994(c); United States Sentencing Commission, *Guidelines Manual*, Ch. 6, Part B (Nov. 1990). The court has an independent obligation to disqualify itself, which a criminal defendant may not waive, under circumstances that give rise to an irrebutable presumption of interest or bias. 28 U.S.C. § 455(b), (e).[18]

The public interest in the integrity of the federal criminal trial process is also served by the freedom which Art. III's tenure and salary provisions give judges to

[18] Thus, a defendant may raise such an issue on appeal even if he has impliedly waived it by entering a guilty plea. *United States v. Gipson*, 835 F.2d 1323, 1325 (10th Cir.), *cert. denied*, 466 U.S. 1044 (1988).

act according to their consciences, without interference from other judges. "The guarantee of life tenure insulates the individual judge from improper influences not only by other branches but by colleagues as well. . ." *Northern Pipeline*, 458 U.S. at 59 n.10. *See Chandler v. Judicial Council*, 398 U.S. 74, 84 (1970) (independence from other judges required in "any phase of the decisional function"); *id.* at 136 (Douglas, J., dissenting); *O'Donoghue v. United States*, 289 U.S. 516, 532 (1932) (a federal judge must be " 'perfectly and completely independent, with nothing to influence or control him but God and his conscience. . .' ") (quoting Chief Justice Marshall, Debates of the Virginia State Convention of 1829-30, at 616, 619); Kaufman, *Chilling Judicial Independence*, 88 Yale L.J. 681, 713 (1979). Rather than act according to his conscience, a magistrate must be concerned not only with Congress' power to eliminate his position, redefine the scope of his duties, or reduce his salary, but with the judiciary's power to do so as well, thereby encouraging "a risk-averse strategy of adjudication . . . inconsistent with the broader policy of autonomous adjudication within the federal courts that underlies the Article III judicial office." Note, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View*, 88 Yale L.J. 1023, 1056-57 (1979) (footnotes omitted) (hereinafter "Yale Note"); *see Pacemaker*, 725 F.2d at 548-49 (Schroeder, J., dissenting).

Where magistrates exercise preliminary adjudicatory authority in a purely advisory capacity, or even in a final capacity in proceedings in which society generally has a less serious interest, public acceptance of the process and its outcome is far more likely than where final adjudicatory authority is delegated for all, or a critical stage of, a felony trial.[19] Where the jury acquits or convicts the

[19] This case, of course, does not present the question of the constitutionality of magistrates' consent trial jurisdiction in misdemeanor or civil cases. Although the government will undoubtedly raise the spectre of wholesale invalidation of the Magistrates Act,

defendant in one of the increasing number of federal capital cases, or in a serious narcotics case such as petitioner's, the public is less likely to respect the outcome where an assistant of the district judge has presided. An erosion of public acceptance of judicial proceedings would directly impact upon the federal judiciary, for "judges who invoke the Constitution daily and depend on it for their power to check the other branches of government can ill afford an erosion of public respect for their unique constitutional qualifications." Yale Note, *supra*, at 1057 (footnote omitted).

Congress' principal interest in the magistrates' system —avoiding creation of additional, more expensive life-tenured judgeships—has been and will be amply served

the holding we seek would not require such a result. It was obvious to the Framers, who refrained from extending Art. III's right to trial by jury to civil cases and the Fifth Amendment's right to indictment to misdemeanors, and to Congress, which withheld general felony trial jurisdiction from magistrates, that the individual and societal interests in the procedures by which felonies are tried, and in the outcome, are far greater than in misdemeanor prosecutions and civil cases. *See Federal Magistrates Act: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 16 (1966) (staff memorandum) ("When a crime reaches a certain level of seriousness, the Constitution guarantees the accused that the trial be by jury, before an Article III judge."). Threats to independent decisionmaking from within as well as from without the judicial branch are likely to be greatest in felony prosecutions, and the need for public acceptance of judicial decisionmaking, especially unpopular decisionmaking, is also at its peak. There is an additional clear distinction between civil and criminal matters: the parties may settle civil disputes, or bring them to alternative forums, but the public's interest in the administration of criminal justice requires the court to supervise the resolution of all criminal prosecutions. *See supra* at 32-33. Even if the Court ultimately were to invalidate additional areas of magistrates' consent trial jurisdiction, it could limit the availability of collateral attack. *See infra* at 40 n.21. Meanwhile, Congress could cure the constitutional difficulty by converting magistrates into lesser Art. III officers, appointed by the President and confirmed by the Senate, with lifetime tenure and irreducible salaries. *See* Note, *The Validity of United States Magistrates' Criminal Jurisdiction*, 60 Va. L. Rev. 697, 716-17 (1974).

through the delegation of functions other than felony *voir dire*. The latest statistics of the Magistrates Division, Administrative Office of the United States Courts, show that in the year ended June 30, 1990, magistrates disposed of a total of 450,565 matters, including 87,682 petty offenses, 13,248 misdemeanors, 4,958 civil cases, 167,382 preliminary proceedings, and a total of 177,295 "additional" civil and criminal duties other than trials. *See* letter from John Thomas Jones, Chief, Division of Magistrates, to counsel for petitioner (March 1, 1991) (a copy of which has been lodged with the Court). During this same period, magistrates conducted felony *voir dire* in only 97 cases. *Id.* While this number undoubtedly was influenced by the uncertain legal status of such proceedings after *Gomez*, even prior to that decision, during the year ending June 30, 1989, magistrates conducted a national total of only 154 felony jury selection proceedings. *Id.* While it is likely true that this Court's approval of magistrates' consent jurisdiction over felony *voir dire* would spur a significant increase in the district court's use of this procedure, it would hardly serve Congress' overriding purpose to free Art. III judges to concentrate on their most important adjudicatory duty, the trial of felony matters. *See* discussion of legislative history in *Gomez*, 109 S. Ct. at 2244-45 and n.23. The absence anywhere in the legislative history of any intent by Congress to authorize felony *voir dire* delegation demonstrates the procedure's lack of importance to Congress. Meanwhile, the inherently cumbersome *de novo* review process that is essential at a minimum to save this procedure's constitutionality, *see Gomez*, 109 S. Ct. at 2247 n.29, would result in little, if any, savings in judicial energy or time. To the contrary, some criminal defendants might capitalize upon the inherent difficulties in this process to delay trials and to develop appellate issues.

Finally, even if the use of a magistrate to conduct felony *voir dire* can be justified under the *Schor* balancing test, there still must be a statutory procedure affording independent Art. III review. Independent district court review of administrative "adjunct" factfinding —a form of "legislative" court—is required under Art. III. *See, e.g., Schor*, 478 U.S. at 853; *Northern Pipeline*, 458 U.S. at 69-70 n.23; Administrative Procedure Act, 5 U.S.C. §§ 701-706; cases discussed *supra* at 20. Since independent review of magistrate-conducted *voir dire* is not authorized by the statute and is unrealistic, the procedure cannot be upheld even under the "legislative" court model.

In sum, the interests underlying Art. III far outweigh Congress' minimal interest in the use of magistrates to conduct felony *voir dire*. This procedure can be prohibited without any harm to Congress' principal purpose to ease the workload of Art. III judges so that they can preside at felony trials.[20]

D. A Defendant's 'Consent' Cannot Validate a Magistrate's Exercise of Judicial Power that Exceeds Article III Limits

Individual litigants cannot "consent" to an officer's exercise of judicial power in violation of Art. III "for the same reason that the parties by consent cannot confer on federal courts subject matter jurisdiction beyond the limitations imposed by Article III, § 2." *Schor*, 478 U.S. at 851. *See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18 (1951). "[N]otions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect." *Schor*, 478 U.S. at 851.

In *Schor*, the Court recognized that, *in addition to* Art. III structural interests that a party may invoke on appeal regardless of his "consent," a litigant may also complain about violation of his *personal* interest in adjudica-

---

[20] The Court also could prohibit the assignment of felony *voir dire* to magistrates under its supervisory power. *See generally Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 808 & nn.19, 21 (1987) (and cases cited therein).

tion by an Art. III tribunal. *Id.* at 848. In this case, petitioner asserts that his individual Art. III rights were violated because the court did not take any steps to assure that he was waiving his rights knowingly, intelligently and voluntarily. *See* Point III, *infra*. But even if petitioner's attorney's "consent" served to waive petitioner's *personal* Art. III rights, petitioner could not "legitimatize" a structural Art. III violation.

III. PETITIONER DID NOT FORFEIT HIS RIGHT TO APPEAL BECAUSE HIS ATTORNEY'S 'CONSENT' DID NOT COMPLY EITHER WITH STATUTORY OR CONSTITUTIONAL REQUISITES FOR WAIVER OF SUCH A BASIC CONSTITUTIONAL RIGHT

Consent is a "critical limitation" on whatever criminal trial jurisdiction is granted to magistrates. *Gomez*, 109 S. Ct. at 2244. Accordingly, "the magistrate's criminal trial jurisdiction depends on the defendant's specific, written consent." *Id.* at 2245; 18 U.S.C. § 3401. The legislative history establishes that Congress expressly adopted the "knowing, intelligent and voluntary" standard of *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) for Art. III waivers in criminal cases. Even were that not the case, the Court's recognition in *Gomez* that jury selection is a "critical" stage of trial at which the defendant's right to the presence of a "person with jurisdiction to preside" is "basic," 109 S. Ct. at 2248, compels the conclusion that the *Johnson v. Zerbst* standard must apply. Petitioner's counsel's "consent" could not satisfy this standard. Nor could petitioner have knowingly waived a "right" that, under prevailing second circuit law, was not even recognized.

A. Since Magistrates Lack Any Consent Jurisdiction Over Felony *Voir Dire*, Petitioner's Right to Object on Appeal Was Immune From Forfeiture or Waiver

If Art. III precludes magistrates from exercising jurisdiction over the *voir dire* phase of a felony trial, regardless of the defendant's "consent", then this defect is immune from forfeiture or waiver. *See supra* at 37-38.

It is self-evident that a defendant cannot be required to object to preserve his right to appeal a substantial jurisdictional defect that is non-waivable. *See McClaughry v. Deming*, 186 U.S. 49, 66 (1902) (defendant's failure to object did not waive appellate challenge to improperly constituted military tribunal).

This same conclusion would be required even if the Court were to hold that the procedure is barred only as a matter of statutory construction. Congress alone possesses the power under Art. III to authorize the lower federal courts to exercise jurisdiction over matters to which federal judicial authority may extend. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. at 701. Thus, if Congress has withheld jurisdiction from magistrates to conduct felony *voir dire*, there is no other source of authority to empower a magistrate to preside. As Justice White wrote for the Court:

> Subject-matter jurisdiction, then, is an Art. III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign. Certain legal consequences directly follow from this. For example, no action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, *California v. LaRue*, 409 U.S. 109 (1972), principles of estoppel do not apply, *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18 (1951), and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings. Similarly, a court, including an appellate court, will raise lack of subject-matter jurisdiction on its own motion.

Id. at 702.

Because a party's explicit waiver is a prerequisite to a magistrate exercising his consent trial jurisdiction under the Magistrates Act, *a fortiori*, where Congress has withheld jurisdiction altogether there can be no stricter preservation requirement. The withholding of statutory authority amounts to the withholding of Art. III authority. Thus, the principle that no "consent" or "waiver" can overcome this constitutional defect applies.

This is not to say that the entire trial therefore lacks a jurisdictional basis, that the district court is deprived of jurisdiction to enter judgment, or that the judgment is thus void and subject to collateral attack.[21] To preserve petitioner's right to complain on direct appeal, it is enough to find, as the Court already did in *Gomez*, that the jurisdictional defect concerned a "critical" stage of trial and a "basic" right of the defendant.

B. Even if a Defendant in a Felony Prosecution Can Consent to Magistrate-Supervised *Voir Dire*, Such Consent Must be Knowing, Intelligent and Voluntary

If this Court concludes under the "additional duties" provision of the Magistrate's Act that a felony defendant may consent to magistrate-supervised *voir dire*, it must determine whether petitioner's attorney's "consent" in this case was sufficient. Absent a valid consent, a magistrate is not empowered under the statute or Art. III to exercise trial jurisdiction, nor can a litigant's right to contest the assignment on appeal be deemed forfeited.[22]

---

[21] Principles of res judicata, *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982); *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962) (plurality opinion), and retroactivity, *see Teague v. Lane*, 489 U.S. 288 (1989), may limit the availability of collateral attack.

[22] *See United States v. Marcyes*, 557 F.2d 1361, 1367 (9th Cir. 1977) (defendant's written consent to misdemeanor trial by magistrate insufficient absent clear explanation on the record of his right to elect a jury trial in the district court); *United States v. Miller*, 468 F.2d 1041, 1043 (4th Cir. 1972) (same), *cert. denied*, 410 U.S. 935 (1973); *see also Clark v. Poulton*, 914 F.2d 1426, 1432-33 (10th Cir. 1990) (consent to civil trial jurisdiction must be explicit and voluntary); *Fowler v. Jones*, 899 F.2d 1088, 1092 (11th Cir. 1990) (same); *Colorado Building and Construction Trades Council v. B.B. Anderson Construction Co., Inc.*, 879 F.2d 809, 811 (10th Cir. 1989) (same); *Hall v. Sharpe*, 812 F.2d 644 (11th Cir. 1987) (same); *Caprera v. Jacobs*, 790 F.2d 442, 444-45 (5th Cir. 1986) (same); *Archie v. Christian*, 768 F.2d 726 (5th Cir. 1985) (court of appeals on its own motion vacates judgment following civil trial where parties' implicit consent did not satisfy requirements of Magistrates Act); *Ambrose v. Welch*, 729 F.2d 1084, 1085 (6th Cir. 1984).

The "additional duties" provision, unlike the provisions for misdemeanor waivers under 18 U.S.C. § 3401(b) or for civil waivers under 28 U.S.C. § 636(c)(2), contains no guidance in this regard. Logically, the correct consent standard for trial jurisdiction should be no less exacting for felonies than for misdemeanors or civil cases. Such a construction would be consistent with Congress' express intention to incorporate the *Johnson v. Zerbst* constitutional standard for all waivers in criminal cases under the Magistrates Act.

Tit. 28, United States Code, § 636(a)(3), provides that magistrates "shall have . . . the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section." Section 3401(b) prescribes the mechanism by which a defendant charged with a misdemeanor may consent to trial by a magistrate:

> Any person charged with a misdemeanor may elect, however, to be tried before a judge of the district court for the district in which the offense was committed. The magistrate shall carefully explain to the defendant that he has a right to trial, judgment, and sentencing by a judge of the district court and that he may have a right to trial by jury before a district judge or magistrate. The magistrate shall not proceed to try the case unless the defendant, after such explanation, files a written consent to be tried before the magistrate that specifically waives trial, judgment, and sentencing by a judge of the district court.

The legislative history, consistent with the above statutory language, reveals Congress' intention to impose a rigorous consent requirement as a prerequisite to the magistrate's exercise of criminal trial jurisdiction:

> It should be noted that the Supreme Court has defined a waiver of rights under the Constitution as "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). In order for a waiver of a constitutional right to occur, "a knowing and intelli-

> gent waiver is necessary." *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). [18 U.S.C. § 3401(b)], by requiring that the magistrate "carefully" explain the right to trial before a district judge and the right to jury trial before the district judge or the magistrate, incorporates this case law. It also requires that the record show that the accused intelligently and understandably rejected the offer, for "anything less is not waiver." *Carnley v. Cochran*, 369 U.S. 506 (1962). In this regard, waiver of the right to be tried by the district court is a critical stage of the proceedings requiring the presence and advice of counsel, unless also waived.

H.R. Rep. No. 287, 96th Cong., 1st Sess. 18 (1979). *See Gomez*, 109 S. Ct. at 2245 n.24 (citing 114 Cong. Rec. 27, 342 (1968) (remarks of Rep. Poff concerning necessity for specific, written waivers before magistrates may exercise criminal trial jurisdiction)).

Under *Johnson v. Zerbst*, a "waiver" that is not knowing, intelligent and voluntary cannot be effective to surrender the right involved. Where a *Johnson v. Zerbst* waiver is required, the burden is not on the defendant to object, but on the government to establish the waiver's sufficiency. Congress' intent to incorporate this caselaw establishes that a defendant's failure to object to substitution of a magistrate at felony *voir dire* does not forfeit his Art. III rights; only a knowing, intelligent and voluntary waiver will do. Since Congress also imposed a writing requirement to ensure further that a misdemeanor defendant's waiver is express and knowing, such a requirement should also be imposed in a more serious felony case as a matter of statutory construction.[23]

---

[23] *See United States v. Aikins*, 912 F.2d 285, 288 (9th Cir. 1990), ("As *Gomez* recognizes, jury selection is a critical stage. If consent can confer authority to preside—a proposition doubted in *France*, 886 F.2d at 227—that consent must meet the minimal requirements of being specific and individual."), *modified*, 923 F.2d 650 (9th Cir. 1991); *United States v. Martinez-Torres*, 912 F.2d 1552, 1556 (1st Cir. 1990) (en banc) ("The statutory concept of requiring defendant's written consent, even for a misdemeanor trial, necessarily negates waiver, even oral consent, by counsel for an uninformed defendant in a felony case.").

In addition to the consent requirements imposed by the statute, the Constitution independently requires that the waiver of such a basic structural trial right meet the *Johnson v. Zerbst* test. Express waivers made personally by criminal defendants traditionally have been required in circumstances implicating fundamental constitutional trial rights "which must be exercised or waived at a specific time or under clearly identifiable circumstances, such as the rights to plead not guilty, to demand a jury trial, to exercise the privilege against self-incrimination, and to have the assistance of counsel." *Barker v. Wingo*, 407 U.S. 514, 529 (1972). *See, e.g., Brewer v. Williams*, 430 U.S. 387, 404 (1977) (right to counsel); *id.* at 419 (1977) (Burger, C.J., dissenting) ("the rights to counsel and silence are personal, nondelegable, and subject to waiver only by the defendant"); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (waiver of trial-related rights cannot be presumed); *Brookhart v. Janis*, 384 U.S. 1, 4 (1966) (blanket trial waiver of right of confrontation must be knowing, voluntary, and personally executed by defendant); *Johnson v. Zerbst*, 309 U.S. at 464 (right to counsel).

The above cases require that the requisite waiver reflect "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. at 464. "Courts should 'indulge every reasonable presumption against waiver,' *Aetna Insurance Co. v. Kennedy*, 301 U.S. 389, 393 (1937), and they should 'not presume acquiescence in the loss of fundamental rights,' *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292, 307 (1937)." *Barker v. Wingo*, 407 U.S. at 525-26. *Accord Wheat v. United States*, 108 S. Ct. at 1698.

This caselaw has been incorporated not only into the Magistrates Act, but into numerous provisions of the Federal Rules of Criminal Procedure as well. *See, e.g.*, Fed.

R. Crim. P. 7(b) (waiver of indictment requires defendant's personal assent in open court "after having been advised of the nature of the charge and of the rights of the defendant"); Rule 11 (requiring extensive colloquy between court and defendant as requisite to guilty plea); Rule 23(b) (requiring written stipulation of parties with approval of court to permit jury of less than 12).

In *Gomez*, the Court equated a felony defendant's right to the presence of a competent tribunal at *voir dire* with other fundamental structural protections, such as the right to an impartial judge or jury. 109 S. Ct. at 2248. Indeed, the right to have a competent officer preside at a jury trial is inseparable from the right to trial by jury itseif. " 'Trial by a jury,' in the primary and usual sense of the term at the common law and in the American constitutions . . . [is a trial] in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them of the facts. . . ." *Capital Traction Co. v. Hof*, 174 U.S. 1, 13-14 (1899). It has long been established that a defendant's waiver of the right to a 12-person jury in a felony trial must be "express and intelligent." *Patton v. United States*, 281 U.S. 276, 312-13 (1930). The same rule also applies to the waiver of a jury entirely. *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942). At least as strict a waiver rule must apply when the defendant is asked to give up his historic right to the presence of a fully independent Art. III judge at such a trial.

Our proposed rule would eliminate the concern the government expressed in *United States v. France* that a defendant might "sandbag" the court by acquiescing in or consenting to a procedure he intended to challenge on appeal. *See* Reply Brief for United States 6 & n.6. The requirement that waivers of fundamental rights be express, knowing and intelligent not only assures both the trial and the appellate courts that the defendant understood the important rights he was waiving, but it also "leaves a record adequate for any review that may be later sought." *Boykin v. Alabama*, 395 U.S. 238, 244

(1969). On the other hand, the failure to obtain such a consent may invite "collateral proceedings that seek to probe murky memories," *id.*, or may make it impossible to subsequently determine the defendant's subjective purpose. When a fundamental right is involved, a reviewing court should not simply presume that the defendant's "waiver" was purposeful rather than inadvertent, unknowing, ill-advised, or involuntary.

This is not a case in which a defendant can be required to assert his rights upon penalty of forfeiture. A "forfeiture" through failure to object or assert a right, which courts sometimes also term a "waiver," occurs when either (A) a non-fundamental procedural or evidentiary right is implicated, or (B) the execution of an express consent waiver is impractical because the right in question is not one "which must be exercised or waived at a specific time or under clearly identifiable circumstances." *Barker v. Wingo*, 407 U.S. at 529. The first situation may occur when a defendant fails to make a timely objection at trial to the introduction of arguably inadmissible evidence or to a judge's ruling. The second forfeiture category is involved when a defendant fails to call *particular* witnesses or ask *particular* questions on cross-examination, even though the rights implicated are fundamental. *Cf. Henry v. Mississippi*, 379 U.S. 442, 451 (1965) ("the deliberate bypassing by counsel of the contemporaneous-objection rule as a part of trial strategy" precludes subsequent assertion of constitutional claims). However, a *blanket* waiver of the right to compulsory process or the right to confront and cross-examine witnesses—like a waiver of the presence of an Art. III judge for the entire *voir dire*—must be established by a knowing and voluntary consent, as when a defendant agrees to a "prima facie" trial, *see Brookhart v. Janis*, 384 U.S. 1 (1966), or when a defendant pleads guilty, *see Boykin v. Alabama, supra.*[24]

[24] Waiver of certain constitutional rights that attach during the criminal investigatory stage under the Fourth, Fifth and Sixth

The argument that a defendant must explicitly object to preserve a right for which a *Johnson v. Zerbst* waiver is required would eviscerate the constitutional doctrine. It cannot be, for example, that a court with *counsel*'s "consent" can convict a defendant without a trial, or without a *jury* trial, and, if the defendant does not explicitly object, he forfeits his appellate rights. The same reasoning holds true for all rights that the Court or Congress has required must be explicitly waived under the *Johnson v. Zerbst* standard, including the right to the presence of an Art. III judge at felony *voir dire*.[25]

Amendments also may be required to be voluntary, *see Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (consent to search), or knowing, intelligent and voluntary, *see Miranda v. Arizona*, 384 U.S. 436 (1966) (waiver of right to remain silent and to counsel), but later must be "raised or waived." The reason for this rule lies in the second category identified in *Barker v. Wingo:* practicality. Unless the defendant, through his objection, alerts the court to the occurrence of such a constitutional violation, the court cannot know, evaluate or remedy the error. *See also Davis v. United States*, 411 U.S. 233 (1973) (defendant's failure to alert court to claim of discriminatory selection of grand jury under Fed. R. Crim. P. 12(b) forfeits issue). On the other hand, in every instance in which a court considers delegating jury selection to a magistrate, the court knows of the constitutional rights involved and can easily conduct a careful waiver procedure.

United States v. Gagnon, 470 U.S. 522 (1985), also is consistent with our position. Contrary to this case, the Court found that no fundamental right was implicated by the trial court's brief *in camera* discussion with a juror in defense counsel's presence, but the defendant's absence. *Id.* at 526. Moreover, in view of Fed. R. Crim P. 43's requirement that waiver be presumed when a defendant "voluntarily absents himself" from a trial proceeding, the defendant's failure to object to the procedure, which he knew about, could be deemed a waiver. *Id.* at 528-29.

[25] If petitioner is correct either that the error in this case was non-waivable or that, if waivable, the requisite standard was not met, then "plain error" analysis—the means for determining whether *unpreserved* error may be redressed on appeal—is irrelevant. However, even under the exacting standard for establishing "plain error," *see United States v. Young*, 470 U.S. 1, 15-18 (1985), the Court should reach the merits because the unauthorized use of a non-Art. III officer to preside at a critical stage of a felony trial

In sum, *Gomez* already has resolved that the right involved in this case relates to a "critical" stage of trial and is "basic." No exigency or other circumstance made it impracticable for the district court to seek petitioner's personal, *Johnson v. Zerbst* waiver. The Court should hold that any waiver of a defendant's fundamental right to the presence at felony *voir dire* of an Art. III judge must be express, knowing, intelligent and voluntary, and that in the absence of such a waiver, a defendant does not forfeit his right to raise the issue on appeal.

C. Petitioner's Counsel's Agreement to Magistrate-Supervised *Voir Dire* Did Not Meet Constitutional Requirements

Judged against the applicable *Johnson v. Zerbst* standard of consent, whether required by the statute, the Constitution or both, defense counsel's agreement to magistrate-supervised *voir dire* was woefully inadequate.

The transcript of the October 14, 1988, appearance before the district judge contains the following colloquy regarding jury selection:

> THE COURT: Let's try to pick the jury Thursday morning. Any objection to picking the jury before a magistrate?
>
> MR. BREITBART: I would love the opportunity.
>
> THE COURT: Thank you very much.

(J.A. 2). This proceeding was so casual that no prosecutor was present. *See supra* at 2.

"seriously affect[s] the fairness, integrity or public reputation of judicial proceedings," *United States v. Atkinson*, 297 U.S. 157, 160 (1936), and, as *Gomez* holds, the error is so fundamental that it can never be deemed "harmless." 109 S. Ct. at 2248. Since the error here is jurisdictional in nature, it can be raised for the first time on appeal. *See Glidden Company v. Zdanok*, 370 U.S. 530, 536 (1962) (Court reaches Art. III issues, despite litigants' failure to make timely objection and the absence of specific prejudice, because "the alleged defect of authority . . . relate[d] to basic constitutional protections designed in part for the benefit of litigants" and in view of "the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers"); cases discussed *supra* at Point II(C) and (D).

On January 6, 1989, prior to the commencement of jury selection, the magistrate asked petitioner's counsel, "I have the consent of your client to proceed with the jury selection?" and counsel responded, "Yes, your Honor." (J.A. 5).

These two colloquies surely did not establish that petitioner understood his right to have an Art. III judge present, that he understood the distinction between such a judge and a magistrate, or that he was intelligently and voluntarily waiving his rights. Indeed, at the time of petitioner's trial, the second circuit had held that a defendant had *no* right to the presence of an Art. III judge at felony *voir dire*, *see United States v. Garcia*, *supra*, and it was the practice to assign this function to magistrates even over the defendant's express objection. *Gilberti v. United States*, 917 F.2d 92, 95 (2d Cir. 1990). Petitioner hardly could have made "an intentional relinquishment or abandonment of a known right," *Johnson v. Zerbst*, 304 U.S. at 464, when the court of appeals had announced to the world that such a right did not exist.

It is also difficult to understand how petitioner could have made a knowing and intelligent waiver in the absence of any statutory guidance concerning the availability of *de novo* or independent district court review of the magistrate's rulings. *See supra* at 28. The district judge appeared to assume that he had no obligation to conduct any review. Counsel, who did not request review even though the magistrate had excused a juror on the government's challenge for cause over counsel's vehement objection, *see supra* at 2, likewise may have assumed his client had no such right in the absence of any such procedure in the statute or the local rules. Certainly petitioner, a stranger to the American criminal justice system and with only limited English language skills,[26] cannot be presumed to have understood

[26] Petitioner is an Israeli citizen who used a court interpreter throughout the proceedings.

what review rights he had or to have knowingly waived them.

In the absence of any express waiver procedure, it also cannot be assumed that the defendant's "consent" was voluntary. The district court's request for consent to assign this procedure to the magistrate certainly implied that this was its desire. Congress was so concerned with such inherent coercion by the court that it required, in civil cases, that the consent procedure be handled by a clerk, under local rules "includ[ing] procedures to protect the voluntariness of the parties' consent." 28 U.S.C. § 636(c)(2); *see Gomez*, 109 S. Ct. at 2244. In a serious felony case such as petitioner's, the inherent pressure upon the criminal defendant to acquiesce is even greater. *See United States v. Aikins*, 912 F.2d at 288.

D. Harmless Error Analysis is Inapplicable to *Gomez*-Type Error

Finally, harmless error analysis cannot save this conviction. In *Gomez*, as here, no specific prejudice was alleged, yet the Court rejected the government's harmless error argument, holding:

> We find no merit to this argument. Among those basic fair trial rights that "can never be treated as harmless" is a defendant's "right to an impartial adjudicator, be it judge or jury." *Gray v. Mississippi*, 481 U.S. 648, 668 (1987) (quoting *Chapman v. California*, 386 U.S. 18, 23 (1967)). Equally basic is a defendant's right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside. Thus harmless-error analysis does not apply in a felony case in which, despite the defendant's objection and without any meaningful review by a district judge, an officer exceeds his jurisdiction by selecting a jury.

109 S. Ct. at 2248.

Although the defendant in *Gomez* lodged an objection, this fact was not necessary to the Court's holding. The applicability of harmless error analysis has never turned

on the means by which an issue has been preserved for review. The denial of a defendant's right to an impartial adjudicator under Art. III is equally unforgiveable in the *Gomez* context whether the defendant explicitly objected or simply did not give a conforming consent. As Justice Harlan wrote in *Glidden Company v. Zdanok*: "Article III, § 1, . . . is explicit and gives the petitioners a basis for complaint without requiring them to point to particular instances of mistreatment in the record." 370 U.S. at 533.

Both the Magistrates Act and the Constitution preclude a finding that petitioner waived his right to assert on appeal the magistrate's erroneous supervision of *voir dire*. The error cannot be deemed harmless. Accordingly, petitioner's conviction must be reversed.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

JOEL B. RUDIN
MASS & RUDIN
598 Madison Avenue, 15th Floor
New York, New York 10022
(212) 753-8700

RICHARD W. LEVITT
148 East 78th Street
New York, New York 10021
(212) 737-0400

JOEL BRENNER *
76 Tompkins Street
East Northport, New York 11731
(516) 757-9189
Counsel for Petitioner

* Counsel of Record

STATUTORY APPENDIX

STATUTORY APPENDIX

CONSTITUTIONAL PROVISIONS

Article II, § 2, cl. 2 of the United States Constitution provides, in pertinent part:

> [The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Article III of the United States Constitution provides, in pertinent part:

> **Section 1.** The Judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
>
> **Section 2.** The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, . . .
>
> • • • •
>
> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; . . .

The Fifth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an im-

partial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Sixth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS

Title 18, United States Code, Section 3401 provides, in pertinent part:

(a) When specially designated to exercise such jurisdiction by the district court or courts he serves, any United States magistrate shall have jurisdiction to try persons accused of, and sentence persons convicted of, misdemeanors committed within that judicial district.

(B) Any person charged with a misdemeanor may elect, however, to be tried before a judge of the district court for the district in which the offense was committed. The magistrate shall carefully explain to the defendant that he has a right to trial, judgment, and sentencing by a judge of the district court and that he may have a right to trial by jury before a district judge or magistrate. The magistrate shall not proceed to try the case unless the defendant, after such explanation files a written consent to be tried before the magistrate that specifically waives trial, judgment, and sentencing by a judge of the district court.

Title 28, United States Code, Section 636 provides, in pertinent part:

§ 636. Jurisdiction, powers, and temporary assignment

(a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment—

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial, and take acknowledgements, affidavits, and depositions; and

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section.

(b)(1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a

criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings of recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A

judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedures for the United States district courts.

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.

(C) Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. . . .

(2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

* * * *

Federal Rule of Criminal Procedure 1 states:

Rule 1. Scope

These rules govern the procedure in all criminal proceedings in the courts of the United States, as provided in Rule 54(a); and, whenever specifically provided in one of the rules, to preliminary, supplementary, and special proceedings before United States magistrates and at proceedings before state and local judicial officers.

Federal Rule of Criminal Procedure 24(a) states:

(a) Examination. The court may permit the defendant or the defendant's attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or the defendant's attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

Federal Rule of Criminal Procedure 25(a) states:

(a) During Trial. If by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying familiarity with the record of the trial, may proceed with and finish the trial.

Federal Rule of Criminal Procedure 54 states, in pertinent part:

Rule 54. Application and Exception

(a) Courts. These rules apply to all criminal proceedings in the United States District Courts; in the

District Court of Guam; in the District Court for the Northern Mariana Islands, except as otherwise provided in articles IV and V of the covenant provided by the Act of March 24, 1976 (90 Stat. 263); in the District Court of the Virgin Islands; and (except as otherwise provided in the Canal Zone Code) in the United States District Court for the District of the Canal Zone; in the United States Courts of Appeals; and in the Supreme Court of the United States . . .

(c) Application of Terms. As used in these rules the following terms have the designated meanings.

* * * *

"District court" includes all district courts named in subdivision (a) of this rule.

"Federal magistrate" means a United States magistrate as defined in 28 U.S.C. §§ 631-639, a judge of the United States or another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates.

"Judge of the United States" includes a judge of a district court, court of appeals, or the Supreme Court.

Rule 1 of the Rules for Proceedings Before Magistrates in the Southern and Eastern Districts of New York states:

Rule 1. Jurisdiction—28 U.S.C. Section 636

Full-time magistrates shall have jurisdiction to discharge the duties set forth in 28 U.S.C. Sec. 636.